IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, ***et al.,***	
Plaintiffs,	**CIV-17-0009-R**
v.	
R. ALEXANDER ACOSTA, SECRETARY OF LABOR, in his official capacity, *et al.*,	
Defendants.	

FIRST AMENDED COMPLAINT

Plaintiffs National Association of Home Builders of the United States, Chamber of Commerce of the United States of America, Oklahoma State Home Builders Association, State Chamber of Oklahoma, National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association ("Plaintiffs"), hereby file this First Amended Complaint against Defendants R. Alexander Acosta, Loren E. Sweatt, Occupational Safety and Health Administration, and United States Department of Labor, alleging, by and through their undersigned counsel, on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

INTRODUCTION

1. On January 4, 2017, Plaintiffs brought this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq., challenging a final rule issued by the United States Occupational Safety and Health Administration ("OSHA" or the "Agency"), originally entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016) (the "2016 Rule") (collectively attached as

Exhibit 1). Certain provisions in the 2016 Rule exceed the statutory authority Congress granted to the Agency under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 651 *et seq.*

2. The 2016 Rule requires employers to establish "reasonable" procedures for employees to report work-related injuries (29 C.F.R. § 1904.35). 81 Fed. Reg. at 29,691. It also gives OSHA additional authority to redress alleged discrimination and retaliation against employees for reporting a work-related injury or illness beyond Section 11(c) of the OSH Act (29 C.F.R. §§ 1904.35(b)(1) and 1904.36). *Id*. at 29,691-92. These requirements are unlawful.

3. First, the creation in 29 C.F.R. §§ 1904.35(b)(l) and 1904.36 of a new scheme to prohibit alleged discrimination and retaliation against employees exceeds OSHA's statutory authority, as it contravenes the express and sole statutory scheme established by Congress in Section 11(c) of the OSH Act to provide redress for retaliatory actions by employers against employees.

4. Second, the requirement in 29 C.F.R. § 1904.35(b)(l) that employers establish "reasonable" procedures for employees to report work-related injuries is arbitrary and capricious under the APA. The 2016 Rule does not define what is "reasonable," and further confuses by tautologically stating that "[a] procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." 81 Fed. Reg. at 29,691. The regulatory text provides employers with no notice of what constitutes compliance with the 2016 Rule.

5. Third, the rulemaking process OSHA used in promulgating the above-described portions of the 2016 Rule failed to provide interested parties with adequate and fair notice of the 2016 Rule and denied interested parties an adequate opportunity to meaningfully comment. In proposing to require the implementation of "reasonable" reporting procedures in the 2016 Rule,

OSHA provided no regulatory text for the public's consideration and failed to provide notice of the extent to which many workplace safety and health policies and procedures might be affected by such a requirement.

6. Fourth, 29 C.F.R. § 1904.35(b)(l) violates the Fifth Amendment to the Constitution by failing to provide employers adequate notice of what constitutes "reasonable" reporting procedures, subjecting employers to citation and potentially significant penalties without providing due process of law.

7. This pleading amends the Plaintiffs' original complaint filed in this action. In addition to the above unlawful actions, the original complaint challenged another requirement in the 2016 Rule that certain employers electronically submit to OSHA information from their OSHA 300 Logs, 301 Forms, and 300A Forms. Subsequent to the filing of the original complaint, OSHA engaged in additional rulemaking to re-examine the electronic submission requirements. On April 5, 2017, this Court granted Defendants' motion to stay the matter pending the outcome of such rulemaking. *See* ECF No. 72.

8. On July 30, 2018, OSHA issued a notice of proposed rulemaking to amend the 2016 Rule to remove the requirements that certain employers submit information from their 300 and 301 Forms to OSHA. 83 Fed. Reg. 36494 (July 30, 2018). OSHA also proposed to require employers to submit their Employer Identification Number ("EIN") to OSHA as part of their annual submission of the 300A Form information. *Id.*

9. On January 25, 2019, OSHA issued a final rule (the "2019 Rule") which made certain amendments to the 2016 Rule. OSHA removed the requirement that employers submit information from their OSHA 300 Logs and 301 Forms to the Agency electronically. 84 Fed. Reg. 380 (Jan. 25, 2019). However, it retained the requirement that employers submit

information from their 300A Forms to the Agency and finalized the additional requirement that an employer's EIN also be submitted. *Id.*

10. In light of the 2019 Rule, Plaintiffs are filing this First Amended Complaint to withdraw the causes of action set forth in the original complaint regarding the electronic submission of the OSHA Forms 300A, 300, and 301.

11. Plaintiffs maintain the remaining causes of action as they were set forth in the original complaint challenging the requirements that employers establish "reasonable" procedures for employees to report work-related injuries and providing OSHA with additional authority to redress alleged discrimination and retaliation against employees for reporting a work-related injury or illness beyond Section 11(c) of the OSH Act (29 C.F.R. §§ 1904.35(b)(1) and 1904.36).

12. For the reasons described above, Plaintiffs respectfully request that this Court order that the requirements set forth in 29 C.F.R. §§ 1904.35(b)(l) and 1904.36 be vacated and set aside in their entirety.

PARTIES

13. Plaintiff National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association that represents more than 140,000 members nationwide who are involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home builder associations around the country. NAHB has members that are headquartered in and operate in the state of Oklahoma and the Western District of Oklahoma.

14. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly

represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly brings litigation challenging the legality of rulemakings by federal agencies, including the U.S. Department of Labor, in order to protect the legal rights of American businesses. The Chamber has members that are headquartered in and operate in the state of Oklahoma and the Western District of Oklahoma. The Chamber brings this action on behalf of its members, in order to advance the interests of its members and, more broadly, the entire business community.

15. Plaintiff Oklahoma State Home Builders Association ("OSHBA") is a non-profit trade association separately incorporated but chartered with Plaintiff NAHB. OSHBA is comprised of more than 2,500 members in 11 local home builder associations around the state of Oklahoma and their builder/associate members. OSHBA represents the Oklahoma building industry. OSHBA is headquartered in this judicial district at 917 N.E. 63rd Street, Oklahoma City, OK 73105 and has members in this judicial district.

16. Plaintiff State Chamber of Oklahoma ("Oklahoma Chamber") is a non-profit, tax-exempt organization incorporated in the state of Oklahoma and headquartered in this judicial district at 330 N.E. 10th Street, Oklahoma City, OK 73104. The Oklahoma Chamber represents more than 1,500 Oklahoma businesses and 350,000 employees. It has been the State's leading advocate for business since 1926. The Oklahoma Chamber has members that are headquartered in and operate in the state of Oklahoma and the Western District of Oklahoma. The Oklahoma Chamber brings this action on behalf of its members, in order to advance the interests of its

members and the business community of Oklahoma.

17. Plaintiff National Chicken Council ("NCC") is the national, non-profit trade association for the chicken production and processing industry. NCC member companies include chicken producer/processors, poultry distributors, and allied industry firms. The producer/processors account for approximately 95 percent of the chickens produced in the United States. NCC is headquartered in Washington, D.C. NCC has members that are headquartered in and operate in the state of Oklahoma.

18. Plaintiff National Turkey Federation ("NTF") is the national trade association for turkey farmers and processers. Members of the NTF include growers, processors, hatchers, breeders, distributors, allied services and state associations. NTF represents all segments of the turkey industry and is composed of over 300 member companies representing more than 95 percent of the turkey industry. NTF is headquartered in Washington, D.C.

19. Plaintiff U.S. Poultry & Egg Association ("USPOULTRY") is the world's largest poultry organization. Members of USPOULTRY include producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, as well as allied companies. The association has affiliations in 26 states and member companies worldwide. USPOULTRY is headquartered in Tucker, Georgia. USPOULTRY has members that are headquartered in and operate in the state of Oklahoma.

20. Plaintiffs' members include employers covered by the OSH Act (29 U.S.C. § 652(5)) who are responsible for providing safe and healthful working conditions to their employees and complying with OSHA standards and regulations, including those related to recording and reporting workplace injuries and illnesses. Many of Plaintiffs' members have adopted procedures for promoting and ensuring the safety and health of their employees. Some of these

procedures may be prohibited under the Rule, as they might not be deemed "reasonable" by the Agency.

21. Defendant R. Alexander Acosta is the Secretary of Labor and is subject to the APA. *See* 5 U.S.C. § 551(1). The Secretary is sued in his official capacity as head of the United States Department of Labor.

22. Defendant Loren E. Sweatt is the Deputy Assistant Secretary of Labor for Occupational Safety and Health and is subject to the APA. *See* 5 U.S.C. § 551(1). The Deputy Assistant Secretary is sued in her official capacity as head of the Occupational Safety and Health Administration.

23. Defendant Department of Labor ("DOL") is an agency of the United States government subject to the APA. *See* 5 U.S.C. § 551(1).

24. Defendant Occupational Safety and Health Administration ("OSHA") is an agency within DOL and is subject to the APA. *See* 5 U.S.C. § 551(1).

JURISDICTION AND VENUE

25. This action arises under the APA, 5 U.S.C. § 500 et seq., the OSH Act, 29 U.S.C. § 651 et seq., and the Fifth Amendment to the Constitution of the United States. Federal question jurisdiction therefore lies in this Court under 28 U.S.C. § 1331.

26. Plaintiffs have associational standing to bring this suit on behalf of their members because those members will be directly and adversely affected by the 2019 Rule and thus would have standing to sue in their own right; because the interests Plaintiffs seek to protect are germane to their organizations' purposes; and because neither the claims asserted nor the relief requested requires an individual member to participate in this suit. *See Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs also participated in the rulemaking

process, by submitting comments and participating in a public meeting convened by OSHA. Thus, plaintiffs' standing is self-evident based on the administrative record. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992).

27. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States, and Plaintiffs OSHBA and Oklahoma Chamber reside in this judicial district and no real property is involved in this action.

BACKGROUND

Recordkeeping and Information Collection under the OSH Act

28. Section 8(c)(l) of the OSH Act provides that each "employer shall make, keep and preserve, and make available to the Secretary [of Labor] or the Secretary of Health and Human Services, such record ... as the Secretary [of Labor] ... may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses." 29 U.S.C. § 657(c)(1).

29. Similarly, Section 8(c)(2) directs the Secretary of Labor to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(2).

30. Section 8(g)(2) of the Act provides the Secretary general authority to prescribe rules and regulations "necessary" to carry out his responsibilities under the Act. 29 U.S.C. § 657(g)(2). Section 24 of the Act also authorizes the Secretary to develop and maintain an effective program to collect, compile, and analyze occupational safety and health statistics. 29 U.S.C. § 673.

OSHA's 2001 Recordkeeping Rule

31. OSHA promulgated its first recordkeeping rule in 1971. 36 Fed. Reg. 12,612 (July 2, 1971). Under the rule, certain employers covered by the OSH Act were required to maintain records about every workplace injury or illness involving death, loss of consciousness, days away from work, restriction of work or motion, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness. 66 Fed. Reg. 5,916, 5,917 (Jan. 19, 2001). Employers were required to keep track of these workplace injuries and illnesses on designated recordkeeping forms. *ld.*

32. On January 19, 2001, OSHA published a comprehensive revision to those rules to modernize, clarify, and expand occupational injury and illness reporting and recording (the "2001 Rule"). *Id*. at 5,916.

33. The Agency cited three primary reasons for the 2001 Rule: (1) "to provide information to employers whose employees are being injured or made ill by hazards in their workplace"; (2) to provide a source of information to OSHA to conduct inspections and target its enforcement resources; and (3) to provide an accurate source of data for the Bureau of Labor Statistics ("BLS") to compile and publish national statistics on workplace injuries and illnesses. 66 Fed. Reg. at 5,916-17. The 2001 Rule created three separate recordkeeping forms: (1) Form 300; (2) Form 301; and (3) Form 300A. *Id.* at 6,130.

34. The Form 300 "Log of Work-related Injuries and Illnesses" ("Form 300" or "OSHA 300 Log") requires employers to record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. *See* Form 300, attached as Exhibit 2. In particular, it requires employers to record the employee's name, job title, date of

injury or illness, and a description of the injury or illness, parts of the body affected, and the object/substance that directly made the employee injured or ill. *Id.* A warning at the top of Form 300 states: "**Attention**: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes." *Id.* (emphasis in original).

35. The Form 301 "Injury and Illness Incident Report" ("Form 301") requires employers to collect and enter even more information on the injury or illness than is on the OSHA 300 Log, including information about the employee, the physician or other health care professional that may have treated the employee, and detailed information about the injury or illness involved and how the injury or illness developed. *See* Form 301, attached as Exhibit 3. Form 301 is incident-specific and must be completed for every work-related injury or illness that is included on the OSHA 300 Log. *Id.* As with the Form 300, the Form 301 warns employers of the need to protect the confidentiality of the information to the extent possible. *Id.*

36. Finally, the Form 300A "Summary of Work-related Injuries and Illnesses" ("Form 300A") requires employers to annually compile aggregate information on certain work-related injuries and illnesses and post the information at the worksite from February 1 to April 30 of the year following the time period covered by the form. *See* Form 300A, attached as Exhibit 4. The Form 300A includes no personally identifiable information about individual injuries and illnesses that occurred at the worksite but does contain information about the number of employee hours worked. *Id.* The 2001 Rule required certain employers to submit their Forms 300A to OSHA on an annual basis as part of the OSHA Data Initiative, a program established by OSHA to collect information to use to develop enforcement targeting. 29 C.F.R. § 1904.41.

37. The crux of the 2001 Rule was to require employers to record on the OSHA 300 Log and Form 301 certain injuries and illnesses that were related to work – as defined in the regulation – and that met the severity criteria established by Congress in 29 U.S.C. § 657(c)(2) ("medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job").

38. OSHA also specifically acknowledged the privacy interests of injured and ill employees, explaining: "OSHA agrees that confidentiality of injury and illness records should be maintained except for those persons with a legitimate need to know the information. This is a logical extension of the agency's position that a balancing test is appropriate in determining the scope of access to be granted employees and their representatives." 66 Fed. Reg. at 6,057.

39. Thus, OSHA required employers to redact the names of employees from the OSHA 300 Logs for certain injuries and illnesses deemed to be "privacy cases." 29 C.F.R. § 1904.29(b)(7).

40. It also limited the extent to which employers could share injury and illness information to others besides those specifically enumerated in the 2001 Rule. *Id*. at § 1904.29(b)(10).

OSHA's Proposal to Amend the 2001 Rule

41. On November 8, 2013, OSHA published a Notice of Proposed Rulemaking ("NPRM") entitled "Improve Tracking of Workplace Injuries and Illnesses," 78 Fed. Reg. 67,254 (Nov. 8, 2013), to revise the 2001 Rule.

42. OSHA proposed to require certain employers to submit electronically their OSHA 300 Logs and Forms 301, and 300A to OSHA on a regular basis, and the Agency stated that it would make this information publicly available on an online database. *Id*. The purported safety and health benefits from the rule flowed from the Agency's commitment to make the data publicly available. OSHA stated that "the online posting of establishment-specific injury and illness information will encourage employers to improve and/or maintain workplace safety/health to

support their reputations as good places to work or do business with." *Id.* at 67,258. In the proposed rule OSHA cited no evidence or data to support this assertion.

43. OSHA stated that it had authority for this proposed rule under Sections 8(c)(l), (c)(2), (g)(2), and 24 of the OSH Act. *Id.* at 67,255.

44. Numerous stakeholders, including some of the Plaintiffs in this cause of action, filed comments objecting to the proposed rule. *See* Docket No. OSHA-2013-0023.

45. Plaintiff NAHB, for example, commented that the OSH Act does not provide OSHA the legal authority to issue the regulation. Docket ID: OSHA-2013-0023-1408 (posted Mar. 14, 2014), p. 3. NAHB stated that there is no express authority granted to OSHA anywhere in the statute to make the various recordkeeping forms available to the public: "The OSH Act omits any language that would provide OSHA authority to make an employers' injury and illness records available to the public." *Id.* at 7.

46. Similarly, Plaintiff Chamber stated, "Conspicuously absent from [Sections 8(c)(1), (c)(2), (g)(2), and 24 of the OSH Act] is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer's injury and illness records containing confidential and proprietary information. Had Congress envisioned or intended that the Secretary of Labor would have the authority to publish this information it surely would have so provided. But of course, it did not and has not. Nor has such authority been contemplated by the numerous bills to amend the OSH Act that have been proposed." Docket ID: OSHA-2013-0023-1396 (posted Mar. 14, 2014), p. 3.

47. In addition, Plaintiff NAHB stated that public disclosure of confidential and proprietary business information would harm employers and employees. It explained:

> In NAHB's view, OSHA is taking a very cavalier approach to the privacy interests

> of employees and others who may be affected by the public release of this information. At the outset, it is important to emphasize that there are several work-related injuries and illnesses that employees would prefer that OSHA not make public to the entire world via the internet. OSHA recognizes this to a degree with its provisions for privacy cases. However, particularly in smaller communities, an employee's identity can be readily determined from a published report. Perhaps the employee is a health care professional who contracted an infectious disease from a patient. Or perhaps the employee was a victim of an assault at the workplace. These are real issues that can and have occurred and OSHA seems to be oblivious to the concerns of employees whose information is going to be published for everyone to see in every country in the world via the internet.

Docket ID: OSHA-2013-0023-1408, 14-15 (emphasis in original).

48. NAHB also objected to the "benefits" that the Agency claims will occur as a result of the rule, stating:

> [The rule's] benefits, examined individually and collectively, do not support the proposed rule. Strikingly, there is no data or evidence cited in the proposal to suggest that these benefits will even occur – no studies, no anecdotal references. This is nothing more than speculation by OSHA of what may occur if the proposed rule is finalized.

Id. at 20 (emphasis in original).

49. Plaintiffs USPOULTRY, NCC, and NTF also objected to several aspects of the proposed rule. In particular, they commented that the entire premise of the rule – that the public will make

judgments about the safety and health programs of employers based on injury and illness data – with no context or explanation, is at odds with the "no-fault" recordkeeping system. Docket ID: OSHA-2013-0023-1109 (posted Mar. 7, 2014), pp. 2-3.

> Providing raw data, out of context, to those who do not know how to interpret it will also create significant issues. Assessing an employer's safety and health efforts or programs is a complicated challenge. Injury rates are just one metric and often are not indicative of the strength of a safety and health program. Despite this, OSHA is encouraging the public to make judgments about a safety and health program based on this limited data. This is simply wrong and we believe counterproductive to workplace safety and health.

Id. at 3.

50. On January 9-10, 2014, OSHA held a public meeting on the proposed rule. 81 Fed. Reg. at 29,625. Numerous stakeholders who participated in the public meeting repeated the objections to the proposed rule set forth in written comments.

OSHA's Supplemental Notice on Disincentives to Reporting

51. After initially reviewing the rulemaking record generated from the proposed rule, and comments made at the public meeting, OSHA sought additional comment on one concern raised by some stakeholders:

> At a public meeting on the proposal, many stakeholders expressed concern that the proposal could motivate employers to under-record their employees' injuries and illnesses. They expressed concern that the proposal could promote an increase in workplace policies and procedures that deter or discourage employees from reporting work related injuries and illnesses. These include adopting

> unreasonable requirements for reporting injuries and illnesses and retaliating against employees who report injuries and illnesses.

79 Fed. Reg. 47,605 (Aug. 14, 2014).

52. The Supplemental Notice of Proposed Rulemaking was just six pages in the *Federal Register*. *Id.*

53. In the Supplemental Notice, OSHA specifically sought comment on whether "to (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit an employer from taking adverse action against employees for reporting injuries and illnesses." *Id*. at 47,606.

54. While OSHA identified the three areas above as potential means to address the concern alleged by some stakeholders at the public meeting, OSHA provided no regulatory text for the public's consideration in the Supplemental Notice despite the notice being labeled a "Supplemental *Notice of Proposed Rulemaking*." *Id.* at 47,605-10 (emphasis added).

55. The Agency also never defined what a "reasonable" or "unreasonable" reporting procedure might be in the Supplemental Notice. *Id.* Instead, the Agency listed some examples of policies that could be considered unreasonable, such as highly burdensome reporting procedures or penalizing employees for failing to report an injury within a specific time period. *Id*. at 47,608.

56. In addition, OSHA sought comment on a variety of supposed "adverse actions" that certain participants "mentioned" in the public meeting on the proposed rule that could impact injury and illness reporting. *Id*. at 47,608.

57. Numerous stakeholders, including several of the Plaintiffs, submitted comments to the

Agency on the Supplemental Notice. *See* 81 Fed. Reg. at 29,625.

58 Many objected to the nature of the Supplemental Notice, which consisted primarily of 18 questions, as being much more in the style of an Advance Notice of Proposed Rulemaking, stating that it was in violation of the APA as it lacked sufficient notice of what would be required and thus did not provide affected parties any meaningful opportunity to comment. *Id.* at 29,669.

59. Other commenters objected to a completely undefined requirement for "reasonable" reporting procedures, noting that such a requirement could be interpreted by OSHA as prohibiting certain safety disciplinary programs, safety incentive programs, and workplace drug and alcohol testing programs that have been shown to improve safety and health in the workplace. *Id*. at 29,670.

60. Commenters also highlighted OSHA's announced intention to contradict the statutory scheme for addressing allegations of retaliation through Section 11(c) of the OSH Act by granting itself the authority to initiate claims even as it admitted that the statute does not permit this:

> The advantage of this provision [the unspecified proposed supplemental regulation] is that it would provide OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under Part 1904. *For example, under 11(c), OSHA may not act against an employer unless an employee files a complaint. Under the additions to the proposed rule under consideration, OSHA would be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint.*

79 Fed. Reg. at 47,607 (emphasis added).

The 2016 Rule

61. Despite the significant opposition to the proposed rule and the issues identified in the Supplemental Notice by a variety of stakeholders, on May 12, 2016 OSHA issued the 2016 Rule, adopting almost all of the electronic recording and reporting obligations as originally proposed and adding requirements related to "reasonable" employee reporting procedures. OSHA also proceeded to grant itself the authority to pursue retaliation complaints outside of the congressionally-mandated Section 11(c) process.

62. The 2016 Rule was subsequently revised to make technical minor corrections on May 20, 2016.

63. The 2016 Rule amended 29 C.F.R. §§ 1910.35, 1910.36, and 1910.41 and a copy is attached and incorporated by reference.

64. The 2016 Rule carried forward the proposal to require certain employers to electronically submit their OSHA recordkeeping forms to the Agency. 81 Fed. Reg. at 29,692. Thus, the 2016 Rule amended § 1904.41 to require employers that have 250 or more employees at any time during the previous calendar year, to electronically submit once a year information from the OSHA 300 Log, Form 301, and Form 300A. *Id.* For employers with 20 or more but fewer than 250 employees in designated industries, employers were required to electronically submit Form 300A Summary of Work-Related Injuries and Illnesses information once a year to OSHA. *Id.* In addition, the 2016 Rule provided that some employers that are not automatically covered by the requirements above may be notified separately to submit certain records to the Agency. *Id.*

65. OSHA stated in the Preamble to the 2016 Rule that it would take the work-related injury and illness information submitted electronically by covered employers and post such information online to make it available to the public. 81 Fed. Reg. at 29,624-25.

66. OSHA claimed that the "main purpose of this section of the final rule is to prevent worker injuries and illnesses through the collection and use of timely, establishment-specific injury and illness data" and that "employers, employees, employee representatives, the government, and researchers may be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses." 81 Fed. Reg. at 29,629 (emphasis added).

67. The 2016 Rule also amended § 1904.35(b)(1)(i) to state that employer procedures for employee reporting of work-related illnesses and injuries must be "reasonable" and that "[a] procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." 81 Fed. Reg. at 29,691.

68. OSHA provided no specific definition of what is a "reasonable" or "unreasonable" reporting procedure in the regulatory text of the 2016 Rule that employers must follow.

69. Only in the preamble commentary to the 2016 Rule, did OSHA provide some examples of procedures that it believed might be unreasonable. But the preamble offers only vague guidance and mixed messages for employers regarding reporting procedures. For example, in describing its position on timely reporting of injuries and illnesses, OSHA recognizes the interests of employers in ensuring timely reporting of injuries and illnesses, but then notes a balancing of fairness "to employees who cannot reasonably discover their injuries or illnesses" and the need for understanding the "overriding objective of part 1904." 81 Fed. Reg. at 29,670. OSHA then states in undefined terms that "for a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness." *Id*. An employer cannot have acceptable certainty that its policy is appropriate until OSHA makes a post hoc determination of whether it is (or is not).

70. In the preamble, OSHA also suggests that certain employee safety incentive programs may be unreasonable under the 2016 Rule. *See id*. at 29,673.

71. OSHA does not define what it means by employee safety incentive programs in the 2016 Rule; however, the Agency notes that they "take many forms" and presumably some of these "forms" are problematic in OSHA's view. *Id*. OSHA suggests that the following programs might be unreasonable under the Rule and therefore prohibited:

- Entering all employees who have not been injured in the previous year in a drawing to win a prize;
- Rewarding a team of employees a bonus if no one from the team is injured over some period of time;
- Conducting an incentive program "predicated on workers remaining 'injury free'";
- Rate-based incentive programs that reward workers for achieving low rates of reported injuries and illnesses; and
- Offering monetary incentives up to $1,500 for employees if zero recordable injuries are reported.

81 Fed. Reg. at 29,673-74.

72. OSHA also suggests in the preamble that mandatory post-injury drug and alcohol testing might deter reporting of workplace injuries or illnesses and thus would not be "reasonable" under the 2016 Rule. *See id*. at 29,673. As with the employee incentive programs described above, OSHA's regulatory text does not define precisely what type of drug and alcohol testing programs it finds unreasonable and therefore unlawful. OSHA suggests in the preamble that the 2016 Rule might prohibit any "post-incident testing" where the employer cannot determine that drug use

was a likely contributor to the incident. *Id*.

73. In addition, the 2016 Rule added § 1904.35(b)(1)(iv) to explicitly prohibit employers from "discharg[ing] or in any manner discriminat[ing] against any employee for reporting a work- related injury or illness." 81 Fed. Reg. at 29,692.

74. This provision goes far beyond the substantive prohibition against discrimination and the articulated procedures specified for discrimination claims found in Section 11(c) of the OSH Act. Section 11(c) prohibits discrimination where an employee "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf or himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1). An employee who allegedly suffered such discrimination may then "file a complaint with the Secretary," who must then conduct an investigation to determine whether discrimination occurred. *Id*. at § 660(c)(2). If the Secretary determines that there has been a violation, then the Secretary shall bring an enforcement action in federal court to obtain injunctive relief, as well as any appropriate reinstatement, rehiring, and back pay. *Id*.

75. Congress enacted Section 11(c) to require a claim under the anti-discrimination provision to be brought before a United States district court on behalf of an employee who files a complaint with OSHA, placing jurisdiction with the United States district court to hear and decide these matters.

76. With this added provision in § 1904.35(b)(1)(iv), OSHA is circumventing the procedural requirements provided in Section 11(c) and giving itself the right to pursue citations against employers for certain alleged retaliatory conduct and giving the Occupational Safety and Health Review Commission the jurisdiction to hear and decide these matters in contravention of the

statute and congressional intent, as OSHA admits in its explanation:

> Section 11(c) only authorizes the Secretary to take action against an employer for retaliating against an employee for reporting a work-related illness or injury if the employee files a complaint with OSHA within 30 days of the retaliation. 29 U.S.C. 660(c).
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> * * *
>
> The final rule allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement *even if no employee has filed a section 11(c) complaint.*
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> * * *
>
> OSHA anticipates that feasible abatement methods for violations of paragraph (b)(1)(iv) will mirror some of the types of remedies available under section 11(c); the goal of abatement would be to eliminate the source of retaliation and make whole any employees treated adversely as a result of the retaliation. For example, if an employer terminated an employee for reporting a work-related injury or illness, a feasible means of abatement would be to reinstate the employee with back pay.

81 Fed. Reg. at 29,671 (emphasis added).

77. The 2016 Rule also clarifies that 29 C.F.R. § 1904.36 is revised to state that Section 11(c) of the OSH Act also prohibits retaliating against employees for reporting work-related injuries or illnesses. 81 Fed. Reg. at 29,692.

78. Finally, the 2016 Rule includes requirements that employers inform each employee of the procedures for reporting work-related injuries and illnesses, that employees have the right to

report work-related injuries and illnesses, and employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses. *Id.* at 29,691.

79. The effective date of the 2016 Rule for the amendments to 29 C.F.R. §§ 1910.35 and 1910.36 was initially August 10, 2016. However, OSHA delayed the enforcement of 29 C.F.R. § 1910.35 to November 1, 2016 in order to provide more time for additional outreach to employers and then again to December 1, 2016 in response to Judge Sam Lindsay's request in another legal challenge of the 2016 Rule in the U.S. District Court for the Northern District of Texas, Civil Action No. 3:16-CV-1998-L.

80. The effective date for the remaining parts of the 2016 Rule was January 1, 2017.

The 2019 Rule

81. On July 30, 2018, OSHA issued a Notice of Proposed Rulemaking to amend its recordkeeping regulations to remove the requirement – just finalized in the 2016 Rule – for certain employers to submit information from their OSHA Forms 300 and 301 to the Agency electronically. 83 Fed. Reg. 36,494 (July 30, 2018). OSHA stated that it was proposing to amend the regulation "to protect sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA)." *Id.* OSHA "preliminarily determined that the risk of disclosure of this information, the costs to OSHA of collecting and using the information, and the reporting burden on employers are unjustified given the uncertain benefits of collecting the information." *Id.*

82. OSHA proposed to continue the requirement from the 2016 Rule that certain employers submit information from their OSHA 300A Forms to the Agency electronically. However, OSHA also proposed to require employers to submit their Employer Identification Number or

"EIN" electronically along with their injury and illness data submission. *Id.*

83. OSHA specifically sought comment on the changes set forth in the proposed rule "and not on any other aspects of part 1904." *Id.* at 36,497. Thus, the proposed rule did not address at all the requirements from 29 C.F.R. §§ 1904.35 and 1904.36 requiring employers to have "reasonable" reporting procedures and establishing a mechanism for OSHA to cite employers for alleged retaliatory conduct outside of the Section 11(c) process. *Id.*

84. OSHA received 1,880 comments on the proposed rule. Many commenters continued to raise concerns with the Agency regarding the requirement that employers submit electronically information from the Form 300A, as well as the requirements in the 2016 Rule regarding "reasonable" reporting procedures and establishing a mechanism for OSHA to cite employers for alleged retaliatory conduct outside of the Section 11(c) process. 84 Fed. Reg. at 383. OSHA largely ignored those comments, however, as they were "beyond the scope of this rulemaking." *Id.* Those requirements from the 2016 Rule remain in effect.

85. In the preamble, OSHA addressed concerns regarding the application of the 2016 Rule to employee drug testing and incident-based incentive programs. *Id.* OSHA states that employee drug testing and incident-based incentive programs are not banned by the 2016 Rule. *Id.* OSHA referenced an October 11, 2018 memorandum that "explained this regulatory text and OSHA's position on workplace incentive programs and post-incident drug testing." *Id. U.S. Dep't of Labor, Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 § 1904.35(b)(i)(iv)* (Oct. 11, 2018), https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11 (as of April 1, 2019). The Agency stated further:

> That memorandum – which referred to the 2016 final rule and its preamble – reiterated the rule's limited scope and expressed how it 'does not prohibit

> workplace safety incentive programs or post-incident drug testing.' … To the extent the 2016 preamble suggested otherwise, it has been superseded. While not the focus of this particular rulemaking, that memorandum accurately reflects OSHA's position and addresses the commenters' concerns.

84 Fed. Reg. at 383.

86. The October 11, 2018 memorandum referenced in the 2019 Rule attempted to "clarify" application of 29 C.F.R. § 1904.35(b)(1)(iv) to safety incentive programs and post-incident drug testing programs. It was the fifth such "clarification" of the requirements of the 2016 Rule since the Rule was issued. OSHA also published guidance on the requirements in three other memoranda and with guidance on OSHA's website in 2016.

87. The guidance material issued by the Agency after promulgation of the 2016 Rule demonstrates the vagueness of the regulatory text. The regulatory text is so vague that the Agency can simply "make-up" interpretive policy as to its meaning without pursuing notice and comment.

88. For example, in an October 19, 2016 memorandum interpreting the requirements, OSHA provided this example of a likely violative program:

> Consider the example of an employer promise to raffle off a $500 gift card at the end of each month in which no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury.

U.S. Department of Labor, Interpretation of 1904.35(b)(1)(i) and (iv) (October 19, 2016), https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html (as of April 1, 2019).

89. In the October 11, 2018 memorandum, OSHA seemingly takes the opposite position: "Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer under § 1904.35(b)(1)(iv) as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."

See https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11.

90. Despite multiple different guidance documents (*see* list referenced in https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11) put forward by OSHA to explain the requirements, employers still do not know what it actually means to have a "reasonable" reporting procedure. And OSHA has shown that it can change its position at any time regarding what constitutes a "reasonable" procedure. As OSHA states in its October 11, 2018 memorandum, "[t]o the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them." *Id.*

FIRST CAUSE OF ACTION

Sections 1904.35 and 1904.36(b)(l) Exceed OSHA's Statutory Authority Under the OSH Act in Violation of the Administrative Procedure Act

91. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-90.

92. The APA, 5 U.S.C. § 706(2)(C), directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

93. Sections 1904.35 and 1904.36(b)(1) exceed OSHA's statutory authority, jurisdiction, and limitations under the OSH Act. Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), prescribes the exclusive procedure for employee discrimination and retaliation claims pertaining to safety and health in the workplace. Sections 1904.35 and 1904.36(b)(1) are contrary to Section 11(c).

94. Congress did not provide OSHA the authority to perform enforcement actions or issue citations on its own, without having received a complaint from an employee, for what it would deem to be discriminatory or retaliatory actions.

95. The 2016 Rule circumvents Congress's determination to create a specific statutory scheme to address discrimination and retaliation claims brought by employees through the procedures specified in Section 11(c) of the OSH Act.

96. OSHA claims authority under the 2016 Rule to request back pay and reinstatement for civil citations of retaliatory conduct in the absence of a complaint from an employee. Nothing in the OSH Act grants this authority to OSHA or to the U.S. Occupational Safety and Health Review Commission that adjudicates contested OSHA citations.

97. The 2016 Rule thus impermissibly conflicts with Congress's carefully crafted legislation to address alleged retaliatory action as it pertains to safety and health in the workplace and exceeds OSHA's authority under the OSH Act.

98. For these reasons, Sections 1904.35 and 1904.36(b)(l) should be held unlawful and set aside.

SECOND CAUSE OF ACTION

Sections 1904.35 and 1904.36(b)(l) are Arbitrary, Capricious, and Otherwise Contrary to Law in Violation of the Administrative Procedure Act

99. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-98.

100. The Administrative Procedure Act directs a reviewing court to "hold unlawful and set

aside agency action" that is "arbitrary, capricious ... or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

101. In rulemaking under the APA, an agency acts arbitrarily and capriciously if it ignores significant evidence in the record, draws conclusions that conflict with the record evidence, relies on contradictory assumptions or conclusions, or fails to consider an important aspect of the problem it purports to be remedying. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must "consider [all] important aspect[s] of the problem," and may not "offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. An agency also has an "obligation to consider" alternatives that are "neither frivolous nor out of bounds," *Chamber of Commerce v. SEC*, 412 F.3d 133, 144-45 (D.C. Cir. 2005), and to respond to key comments that "if true, ... would require a change in [the] proposed rule," *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (internal quotation marks and citations omitted). An agency also must acknowledge and offer a reasoned explanation for any change in its position. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

102. In promulgating Sections 1904.35 and 1904.36(b)(1), OSHA acted arbitrarily, capriciously, and otherwise contrary to law. The 2016 Rule's requirement that employers adopt "reasonable" reporting procedures is so vague and ambiguous as to deprive employers of notice of their obligations under the Rule. Further, the rulemaking record does not support the need to implement such a vague and ambiguous obligation, which has the potential to prohibit a myriad of employer procedures and processes designed to improve workplace safety and health. OSHA's arbitrary and capricious actions are also evidenced by the 2019 Rule, which repealed

the requirement for employers to submit their OSHA Forms 300 and 301 to the Agency electronically. It was that electronic submission requirement and the public posting of the information that served as the basis for the Agency promulgating the requirements related to "reasonable" reporting procedures. The predicate for these provisions has been removed by the 2019 Rule.

103. For these reasons, Sections 1904.35 and 1904.36(b)(1) should be held unlawful and set aside.

THIRD CAUSE OF ACTION

OSHA Enacted Sections 1904.35 and 1904.36(b)(1) Without Proper Observance of Procedure Required by Law in Violation of the Administrative Procedure Act

104. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-103.

105. The Administrative Procedure Act directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law." 5 U.S.C. § 706(2)(0).

106. Under the APA, an agency must provide notice and an opportunity to comment on its proposed rules. 5 U.S.C. § 553(c). In that notice-and-comment process, the agency must respond to "relevant" and "significant" public comments, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977), and to those comments "which, if true, ... would require a change in [the] proposed rule," *La. Fed. Land Bank Ass'n*, 336 F.3d at 1080 (internal quotation marks and citations omitted). "[A]n agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

107. The rulemaking process OSHA used in promulgating the "supplemental" portions of the 2016 Rule failed to provide interested parties with adequate and fair notice of the final rule and

denied interested parties an adequate opportunity to meaningfully comment. In doing so, OSHA's adoption of a broad and ambiguous rule, through which OSHA would seek to prohibit certain programs that improve workplace safety and health but that OSHA might deem unreasonable, prejudiced Plaintiffs and their members.

108. For these reasons, Sections 1904.35 and 1904.36(b)(1) should be held unlawful and set aside.

FOURTH CAUSE OF ACTION

Sections 1904.35 and 1904.36(b)(l) Violate the Fifth Amendment to the U.S. Constitution in Violation of the Administrative Procedure Act

109. Plaintiffs re-allege and incorporate by reference the allegations in paragraphs 1-108.

110. Under the Administrative Procedure Act, agency action shall be vacated and set aside where it is contrary to constitutional right or privilege. 5 U.S.C. § 706(2)(B).

111. The Due Process Clause of the Fifth Amendment requires that regulated parties be given fair notice of conduct that is prohibited or required. *FCC v. Fox TV Stations, Inc*., 132 S. Ct. 2307, 2317 (2012). "[R]egulated parties should know what is required of them so they may act accordingly [and] ... precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox TV Stations, Inc*., 132 S. Ct. at 23I7.

112. The requirement in Section 1904.36(b)(1) that employers adopt "reasonable" reporting procedures violates the due process protections provided for under the Fifth Amendment to the U.S. Constitution. The requirement is so vague and ambiguous that it provides no guidance as to what is acceptable or unacceptable with respect to employee injury and illness reporting procedures. It subjects employers to citations and potentially significant penalties for engaging or not engaging-in conduct that is undefined by the Agency.

113. For these reasons, Sections 1904.35 and 1904.36(b)(1) should be held unlawful and set

aside.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief:

A. A declaratory judgment and order that the provisions of the 2016 Rule at issue in this matter are unlawful for the reasons set forth above;

B. An order vacating and setting aside the unlawful provisions of the 2016 Rule;

C. An order awarding Plaintiffs their reasonable costs, including attorneys' fees, incurred in bringing this action; and

D. An order granting such other and further relief as this Court deems appropriate.

Dated: April 1, 2019

Respectfully submitted,

/s/ Nathan L. Whatley
Nathan L. Whatley, OBA #14601 (Local Counsel)
McAfee & Taft A Professional Corporation
10th Floor, Two Leadership Square
211 North Robinson
Oklahoma City, OK 73102-7103
405.235.9621 / 405.235.0439 (Fax)
Nathan.Whatley@mcafeetaft.com

JACKSON LEWIS, P.C.

/s/ Tressi L. Cordaro
Tressi L. Cordaro (*Pro Hac*)
Raymond Perez (*Pro Hac*)
10701 Parkridge Boulevard, Suite 300
Reston, VA 20191
703.483.8300 / 703.483.8301 (Fax)

LITTLER MENDELSON, P.C.

/s/ Bradford T. Hammock
Bradford Hammock (*Pro Hac*)
1650 Tysons Blvd., Suite 700
Tysons Corner, VA 22102
703.442.8425 / 703.442.8428 (Fax)

Attorneys for Plaintiffs

Of Counsel:

David Jaffe, Esq. (*Pro Hac*)
Felicia Watson, Esq. (*Pro Hac*)
National Association of Home Builders of the United States
1201 15th Street, NW
Washington, DC 20005
202.266.8200
Attorneys for Plaintiff National Association of Home Builders of the United States

Steven P. Lehotsky, Esq. (*Pro Hac*)
Janet Galeria, Esq. (*Pro Hac*)
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
202.463.5337

Attorneys for Plaintiff Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 1, 2019, a true, correct, and exact copy of the foregoing document was served via electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

/s/ Bradford T. Hammock
Bradford Hammock (*Pro Hac*)