

COMMENTS

OF THE

NATIONAL ASSOCIATION OF MANUFACTURERS

AND

THE U.S. CHAMBER OF COMMERCE

BEFORE THE

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Docket No. OSHA-2015-0006

80 Fed. Reg. 45116 (July 29, 2015)

**Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate
Record of Each Recordable Injury and Illness**

I. Introduction

The National Association of Manufacturers (the NAM) and U.S. Chamber of Commerce (Chamber) appreciate the opportunity to submit these comments to the U.S. Occupational Safety and Health Administration (OSHA) in response to the Notice of Proposed Rulemaking (NPRM) referenced in 80 Fed. Reg. 45116, dated July 29, 2015, Docket No. OSHA 2015-00064. The proposal announces changes to the OSHA illness and injury recordkeeping regulations at 29 C.F.R. § 1904 in response to the District of Columbia Court of Appeals decision in *AKM LLC v. Sec'y of Labor (Volks II)*.¹ The proposal will affect the NAM and Chamber members' compliance obligations significantly.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$2 trillion to the U.S. economy annually, provides the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and creates jobs across the United States.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. More than 96 percent of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies

¹ 675 F.3d 752 (D.C. Cir. 2012).

are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large. Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

Both the Chamber and the NAM have long histories of involvement in OSHA regulatory proceedings including participation in the recordkeeping changes in 2001. Members of the respective organizations are subject to the requirements of the proposal and would be adversely affected by its adoption. Accordingly, we trust that OSHA will be mindful of our comments and withdraw its proposal accordingly.

II. Executive Summary

On July 29, 2015, OSHA published a proposed rule to “clarify” employers’ recordkeeping obligations under 29 C.F.R. Part 1904.² OSHA’s intent is to characterize any failure to update or record a workplace injury or illness case as a “continuous” violation subject to citation for the full five-plus-year period during which the records must be maintained. OSHA’s proposal is an attempt to negate a Circuit Court opinion holding that recordkeeping violations are subject to the six-month statute of limitations in section 9(c) of this OSH Act that begins when the grace period for reporting ends. If the proposal is adopted significant additional requirements will be imposed on employers to review and verify OSHA 300 logs and individual illness and injury records for accuracy under a “continuing obligation to record the case on the

² 80 Fed. Reg. 45,116.

Log and/or Incident Report during the five-year retention period for that Log and/or Incident Report,” and require that employers keep and maintain “accurate” recordkeeping logs.

While OSHA maintains that it is merely clarifying the recordkeeping rule in response to the District of Columbia Court of Appeals decision in *Volks II*, OSHA’s proposed “clarification” is in fact a substantial substantive modification of the statutory limitation on issuing citations based on the Circuit Court’s reading of the clear and unambiguous language in the statute. Such a change would have a resounding impact on employers by imposing new compliance obligations and dramatically increasing employers’ liability for potential recordkeeping violations, with little or no benefit to occupational safety and health programs in the U.S. OSHA’s proposed rule further misapplies the “discovery rule” to recordkeeping violations in direct contradiction to the OSH Act’s statutory language, purpose, and legislative history.

A failure to record an injury or illness does not expose employees to risk of injury in any real sense, in contrast to the existence of a physical condition or exposure in the workplace that employees may encounter in their work activities. Because of this difference, OSHA’s proposed clarification of the rule to provide for the “continuing violation” doctrine creates new liability for an employer that is inconsistent with OSHA authority.

OSHA also failed to comply with Executive Order 12866 because the proposal is a novel and far-reaching interpretation of OSHA’s authority, as well as its assertion that a court decision interpreting statutory language can be undone by a regulatory rulemaking. Not only would this rulemaking improperly expand OSHA’s authority to issue citations, but it would do immeasurable damage to the courts’ role of identifying when an agency has overreached its authority and the authority to rein that agency in. We support the Coalition for Workplace

Safety's analysis of the Executive Order that this proposal should have been reviewed by the Office of Information and Regulatory Affairs under E.O. 12866. If OSHA proceeds with this rulemaking, notwithstanding our urging otherwise, any final regulation should receive review under E.O. 12866.

The history of the OSHA recordkeeping rule is an example of regulatory overgrowth. As discussed below, OSHA's pursuit of the continuing violations theory can only be described as an attempt to create unnecessary recordkeeping regulations for the purpose of enhancing enforcement opportunities. We do not think that the changes will make the annual statistics produced by the Bureau of Labor Statistics (BLS) more accurate, nor will it enhance OSHA's inspection targeting program. For most employers, it will not change the impact of the records on the management of their health and safety programs. In *toto*, the changes seem only to benefit OSHA's seeming intent to punish employers with greater numbers of citations and, hence, greater penalties. We think this is insufficient justification to contradict Congress' clear directive to minimize burdens' on employers while producing accurate nation-wide statistics on injuries and illnesses and the proposal should be withdrawn.

III. OSHA's Recordkeeping Standard

Congress directed OSHA 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.³

³ Occupational Health and Safety Act, 29 U.S.C. 657(c)(2) (1970)[hereinafter "OSH Act"].

Although recordkeeping is a meaningful component of the OSH Act, it was always to be used for purposes of administration and data collection.⁴

The committee recognizes the need to assure employers that they will not be subject to *unnecessary* ... record-keeping requests and has specifically stated this intent in section 8(d).⁵

Emphasis added.

OSHA's recordkeeping requirements have continued to evolve since the adoption of the Act in 1970. What started out as a relatively simple proposal in the original May 1971 proposal that would have required (1) records to be kept on the government's fiscal year basis (then July 1-June 30); (2) cases recorded within 48 hours; (3) each entry to be initialed by the officer or employee making the entry; and (4) retention of records for three years, among other requirements has morphed into a complex set of requirements comprising 30 separate sections in the Code of Federal Regulations, numerous requirements in the form of questions and answers, and further guidance in the form of interpretation letters. In the May 1970 proposal, interested parties were given 20 days to submit comments. The final rule, adopted in July 1971, established (1) the calendar year as the recordkeeping period, (2) a five year retention period; and (3) recording within two working days. There was nothing in the *Federal Register* notice adopting these requirements explaining the basis for the changes were made from the proposal to the final rule.⁶

In 1977, the recording obligation was changed to require recording cases "as early as practicable but no later than six working days after receiving information that a recordable injury

⁴ See U.S. Senate Labor and Public Welfare Committee Report on the Occupational Safety and Health Act of 1970, (P.L. 91-596), No. 91-1282, 5193-5194 (1970)[hereinafter "Legislative History"].

⁵ *Id.* at p. 5193.

⁶ 36 Fed. Reg. 12,612 (July 2, 1971).

or illness has occurred.”⁷ Employers were permitted to keep the records electronically, and a log was required at each establishment that was current within 45 days, and a certification of the log by the employer’s representative who supervised its preparation was adopted in place of the initials of the recording employee. The 1982 changes expanded the requirements related to access to the records, providing for employee access. The 1997 revisions did not materially change any of these requirements.

The changes adopted in 2001 dramatically changed the scope and content of the injury and illness recordkeeping requirements. Additional information was required on the forms, including the employee’s date of hire, emergency room visits, time the employee began work (starting time of the shift), and time of the accident, for which OSHA estimated it would take two minutes per entry to add the information. The regulations became far more complex, contained more detail on the updating requirements, and specified a four-hour time limit within which an employer had to provide the records to OSHA upon request, among numerous other requirements. Further changes in the rules have been adopted since 2010, and we now have two additional pending changes. What was supposed to be a simple collection of cases reported to OSHA annually for a period of three years for the purpose of gauging workplace safety across the nation in the original 1971 proposal would become, if the current proposal is adopted, a full-time job requiring management attention and activity for nearly five-plus years.

IV. OSHA’s Proposal

The proposal is the result of OSHA’s loss in the Circuit Court of Appeals in the so-called *Volks* decision. The facts of that case show that a 2006 inspection resulted in allegations of more

⁷ 42 Fed. Reg. 65,166 (Dec. 30, 1977).

than 150 violations of various provisions of Part 1904 of the regulations with proposed penalties totaling approximately \$13.3 million. While OSHA's inspection began on May 6, 2006, and the closing conference was held on May 11, 2006, in each of the alleged recordkeeping violations cited, the events on which the citations were based occurred more than six months prior to the date of the issuance of the citation, exceeding the statute of limitations found in 29 U.S.C. § 658(c). The alleged unrecorded cases occurred on dates ranging from, at a minimum, six months plus 10 days to as much as 54 months (four and one half years) prior to the citation issuance date, while the citations related to certification of the forms and the completion of the summaries were of similar vintage.

OSHA has often taken the position that if the closing conference occurred within the six months of the date of the citation, the citations were not outside the statutory limit. Moreover, OSHA argued that Volks' alleged violations from January 2002 through 2005 were continuing violations subject to citation in May 2006. Section 1904.29(b)(3) requires that the Incident and Log Forms are to be completed within seven days of the employer learning of the case. Because Section 1904.33(a) by its terms requires employers to retain records for five years⁸ and to update, with new information, these forms, OSHA argued that the obligation to record a case "continue[s] every day that an unmet record-keeping obligation remains unsatisfied."⁹ The Occupational Safety and Health Review Commission (OSHRC), following its long-standing precedent, agreed, upholding the Administrative Law Judge's (ALJ) decision finding the violations to be "continuing violations," tolling the expiration of the six-month statute of

⁸ The retention period is actually longer than five plus years. The records have to be kept for the current year, plus five additional years, such that at the end of December in any given year, nearly six full years of records are required, and liability under OSHA's scheme would continue for another six months less one day.

⁹ *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012)[hereinafter *Volks II*].

limitations until the end of the five-year document retention period.¹⁰ Volks appealed the decision to the D.C. Circuit, arguing that OSHA's interpretation was not consistent with the plain language of the statute and, therefore, OSHA's citations were untimely.¹¹

On July 29, 2015 OSHA published the notice to amend the recordkeeping obligations at 29 C.F.R. Part 1904, which require an employer to record, review, maintain, and certify information relating to an employee's work-related injuries and illnesses.¹² OSHA acknowledges that the Notice Of Proposed Rulemaking (NPRM) was issued in response to the 2012 decision issued by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) in *AKM LLC v. Secretary of Labor (Volks II)*.¹³ In fact, the proposed rule does not "clarify" the existing Recordkeeping rule, but it makes substantive changes. Based on OSHA's summary of the decision and its faulty analysis, it is important to briefly summarize the salient points of the D.C. Circuit's decision on which our comments are based.

V. The D.C. Circuit's *Volks* Decision

Volks asserted the statute of limitations defense in section 9(c) of the Act, which states that "no citation may be issued...after the expiration of six months following the occurrence of any violation"¹⁴ The D.C. Circuit concluded that OSHA's citations were untimely under the Act's statute of limitations and the Part 1904 record-keeping and five-year record retention requirements.¹⁵ The Court found the language of the Act in section 9(c) and Section 1904 to be

¹⁰ See *Secretary of Labor v. AKM LLC*, 29 BNA OSHC 1414 (Rev. Comm'n 2011), available at http://oshrc.gov/decisions/pdf_2011/06-1990.pdf [hereinafter *Volks I*].

¹¹ *Id.*

¹² *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness*, 80 Fed. Reg. 45,116 (July 29, 2015).

¹³ 80 Fed. Reg. 45,120, col. 1 (stating that the "*Volks II* decision has led to a need for OSHA to clarify employer's obligations.")

¹⁴ *Volks II*, at 752.

¹⁵ *Id.*

clear. Noting that the statute of limitations period under section 9 of the Act runs for six months after the “occurrence of any violation,” it concluded that an “occurrence” refers to an event that happened in the past at a fixed point in time.¹⁶

Under the *Chevron* line of cases Courts are to defer to an agency’s interpretation of statutory and regulatory language that is ambiguous, and the agency’s interpretations are reasonable. But the Court in *Volks* concluded that the language was not ambiguous and OSHA’s interpretation was unreasonable; accordingly, it declined to defer to OSHA’s interpretation.¹⁷

The Court, therefore, rejected OSHA’s attempt to create an open-ended recording period by characterizing the obligation to record a case as a “continuing duty,” on which the limitation in section 9(c) is merely an addition. *Volks*’ violative conduct was complete on the eighth day after it learned of each of the cases, said the Court, and at that point in time, OSHA would have been able to issue the citation if the relevant case was incorrectly or not recorded. The last allegedly violative event occurred on April 22, and was complete on April 29, 2006, ten days and six months before OSHA issued the citations.¹⁸

Therefore, the Court found that “every single violation for which *Volks* was cited – failure to make and review records – and every workplace injury which gave rise to those unmet recording obligations were ‘incidents’ and ‘events’ which occurred more than six months before the issuance of the citations.”¹⁹

¹⁶ *Id.*

¹⁷ *Id.* at 5.

¹⁸ *Volks II*, at 752-755.

¹⁹ *Id.* at 755.

The Court's decision was not based solely on an analysis of the existing rule, but on the language in the OSH Act that in its view is clear and unambiguous and which, therefore, cannot be overruled by an agency interpretation. The Court, in effect, anticipated this rulemaking and made it clear that it is precluded by the OSH Act.

To avoid the clear implications of the Congressional mandate, OSHA argued to the D.C. Circuit that the definition of an "occurrence" could include a circumstance where an "unmet record-keeping obligation remains unsatisfied."²⁰ Thus, OSHA's position in *Volks* is identical to the position that OSHA is taking in the proposed rule.

The D.C. Circuit, quoting the dissent at the OSHRC, described that argument as tying a "straightforward issue into a Gordian knot," and a mere attempt to kick up a "cloud of dust in an effort to lead" the Court to OSHA's interpretation.²¹ The D.C. Circuit stated that OSHA's position has three flaws – all of which the Court rejected on the basis of the limitation that Congress incorporated into the Act.²² The first is that OSHA's interpretation renders the language of the statute meaningless or infinitely elastic: The statute of limitation begins to run when OSHA says it does, and it can be extended to any point in the future.

The second is that OSHA's interpretation that the duty to maintain an existing record expands the discrete obligation to create a record. OSHA's interpretation was incorrect, the Court held, since these are distinct requirements. Lastly, the Court rejected OSHA's argument that when Congress empowered OSHA to issue regulations, Congress intended that a failure in record-making obligations should be treated as a continuing violation.

²⁰ *Id.* at 755.

²¹ *Id.* at 755-756.

²² *Id.*

Instead, the D.C. Circuit said that Congress' intent is "quite different and quite clear," an employer must make records of a workplace injury within seven days after the injury or illness.²³ If the employer fails to do so, that is a violation. OSHA may issue a citation for that violation within six months of its occurrence. If the employer loses or destroys a record within five years, that is a violation too, and a citation may issue within six months of the date on which the record is destroyed or lost.

OSHA's attempt to characterize the duty to record as a continuing duty for a period well past the six-month limitation in the Act is directly inconsistent with Congressional intent. The six-month limitation on issuing citations was a key provision that the Senate and House negotiated in conference. Only after considerable discussion and compromise did Congress agree to the language in section 9(c). Initially, citations were to be issued "forthwith;" language in the conference report shows that Congress intended that except "[i]n the absence of exceptional circumstances any delay is not expected to exceed 72 hours from the time the violation is detected."²⁴ The House proposed language that "prohibited issuance of a citation more than three months after the occurrence of any violation. The Senate bill had no such statute of limitations. The Senate receded with an amendment changing the three months to six months."²⁵

OSHA argues in favor of the proposition by comparing the recordkeeping deficiencies to hazardous conditions to which employees may be exposed when standards are not followed. This rationale fails for the following reason: when an employee has access to or is exposed to an existing hazardous condition, a violation occurs because the potential for injury or death remains

²³ *Volks II*, at 756.

²⁴ Legislative History, P.L. 91-596, Conference report 91-1765, *Statement Of The managers On The Part Of The House*, at 5234 (1970).

²⁵ *Id.* at 5234.

at the time that exposure occurs. To cite these “conditions” under the current law, the last “exposure” of the employee must allegedly have occurred within six months of the date of the citation. Thus, an “occurrence” of the violation exists for each and every fresh new exposure.²⁶ Such occurrences are clearly independent and depend in no way on a “continuing obligation” to correct the condition deemed to be a violation. Rather the “occurrence” is the exposure to the hazard that is the violation supporting the citation. There is no corresponding event that occurs subsequently to the failure to record a case that would start a new statute of limitations period. Recordkeeping violations bear no similarity to violations of standards related to hazardous physical conditions.

If the Court had stated that, in the absence of an agency interpretation the court was compelled to infer Congressional intent or that the language was ambiguous, perhaps the proposed rule could be viewed as a response to a court’s invitation to promulgate rulemaking. Here, however, the Court held that Congress’s intent is abundantly clear. Congress wanted OSHA to issue citations promptly and within a finite window of time. Thus, OSHA’s rulemaking effort, which merely repeats its arguments before the Court and has already been held to exceed the Agency’s delegated authority, would turn what started as a three-day period into a period of uncertainty lasting up to as many as 2,370 days. Surely this stretches the delegation of legislative authority beyond the pale.

²⁶ Indeed, OSHA advances this interpretation under its egregious violations policy wherein it asserts the authority to issue a separate violation and penalty for (1) each employee exposed to a hazardous condition or (2) on each occasion that an exposure to a hazard occurs.

VI. OSHA's Justification of The Proposed Changes Fails as the Cases Cited Do Not Support Its Position

In OSHA's view, the NPRM would "amend its recordkeeping regulations to clarify."²⁷ The proposal is far more than a simple clarification. OSHA mistakenly presumes that the problem with *Volks* is an inadequately worded rule, when the *Volks* court actually found strong legal and statutory support for interpreting the recordkeeping standard as imposing a duty to accurately record injuries as lasting only seven days, rather than five-plus years. Moreover, OSHA's attempt to conflate the record retention period with the statute of limitations ignores clear jurisprudence on the issue.

OSHA referenced six Supreme Court cases, 20 circuit court decisions, and two tax court cases. We think the latter two are inapposite on their face. The case of *Gabelli v. SEC* was not among the Supreme Court cases OSHA cited, and the Agency discounted it in a footnote. In *Gabelli* the Court rejected the SEC's attempt to graft a discovery rule onto the five-year statute of limitations in its enforcement cases.²⁸ Like OSHA, the SEC argued that the limited resources of the agency provided a rationale to allow the agency to look back beyond the limitations period to charge the violator with administrative violations. The Court refused, discussing the common understanding that a claim accrues "when the plaintiff has a complete and present cause of action."²⁹ The Court summarized the important public policy purpose of statutes of limitation concisely:

This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v.*

²⁷ 80 Fed. Reg. 45,116.

²⁸ *Gabelli v. SEC et al.*, 133 S.Ct. 1216 (2013).

²⁹ *Id.* at 1220.

Wood, 528 U. S. 549, 555 (2000). Statutes of limitations are intended to “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944). They provide “security and stability to human affairs.” *Wood v. Carpenter*, 101 U. S. 135, 139 (1879). We have deemed them “vital to the welfare of society,” *ibid.*, and concluded that “even wrongdoers are entitled to assume that their sins may be forgotten,”³⁰

The SEC argued that, notwithstanding the clear purpose of the rule, a person committing fraud against the government should not be permitted to benefit by the inability of the government to discover the alleged violation. The SEC could point to no case where the discovery rule was applied in a government enforcement action involving civil penalties.

That situation is exactly parallel to the OSHA situation. OSHA characterizes the obligation to record the cases as a “continuing violation” so as to avoid the clear import of the legislative language and of *Gabelli*. We think this is disingenuous. OSHA is not an innocent victim here. Its regulatory program does not rise and fall on the accuracy of individual employer injury and illness records. It is a fact that OSHA’s purpose is to set standards and to create incentives for compliance by inspecting employers, and Congress limited its authority to issue citations to six months after their occurrence. To adopt language that would increase the period in which the employer is exposed to violations that have a limited, minimal impact on the health and safety program is to elevate form over substance. It just does not comport with the overall congressional scheme.

The Supreme Court’s disdain for executive branch attempts to extend the period of liability is ancient. The *Gabelli* court cited Chief Justice Marshall who “used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that it “would be utterly repugnant to the genius of our laws” if actions for penalties could “be brought at any distance of time.” *Adams v. Woods*, 2 Cranch 336, 342 (1805).” The Court further stated, As we held long ago, the cases in which “a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in

³⁰ *Wilson v. Garcia*, 471 U. S. 261, 271 (1985).

character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.” *Amy v. Watertown* (No. 2), 130 U. S. 320, 324 (1889) (internal quotation marks omitted). Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of §2462, we decline to do so.³¹

OSHA’s proposal is another brazen attempt by a bureaucracy to expand its authority notwithstanding clear congressional indications to the contrary.

As noted, OSHA cited a number of other court decisions in support of its proposal. We suggest that not only do they not support OSHA’s proposal, in fact, when read carefully, they are inapposite. For example, OSHA cited *National Railroad Passenger Corporation v. Morgan*, for the proposition that “the statute authorized application of a continuing violations doctrine in hostile work environment cases, holding that in such cases, an unlawful employment action can “occur” over a series of days or even years.”³² However, the Court did *not* say that such violations could sustain a claim but rather pointedly held that “the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period. We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as *any act contributing to that hostile environment takes place within the statutory time period.*”³³ [Emphasis added] So to establish jurisdiction, at least one discriminatory act had to occur within the limitations period, but once established, the court could consider other acts for purposes of establishing the damages. This is obviously inconsistent with OSHA’s proposed approach.

³¹ *Volks II*, at 756.

³² 536 U.S. 101 (2002).

³³ *Id.* at 102.

Havens Realty Corporation v. Coleman, is a similar situation.³⁴ At least one of the violative conditions existed within the statutory limitations period, and the Court allowed the Circuit Court decision to reach back to violations that occurred outside the limitations period. OSHA again misrepresents the holding in the case and ignores material and controlling differences in the facts.

In the remaining Circuit Court cases OSHA cited, of *Earle v. Dist. of Columbia*, *Padres Hacia Una Vida Mejor v. Jackson*, *Edelkind, Are, Inst. For Wildlife Prot. v. United States Fish & Wildlife Serv.*, and *PECO Energy Co.*, all involve different statutes, different types of complaints, and an “ongoing” or continuing action, more akin to an existing hazard to which an employee may be repeatedly exposed. They do not involve distinct events in the past beyond the limitations period. Similarly, *Sierra Club v. Simkins Industries*, involved a failure to collect water samples, rejecting a defense that that the company never collected the data it needed to create the records in the first place. The Circuit Court’s analysis, like that of the Commission overlooks a simpler analysis: does not the requirement to collect the water samples continue until the samples are taken? If so, this is akin to the existing workplace hazard with opportunity for employee exposure, not a singular act at a certain point in time. Other cases cited by OSHA to support its approach similarly point to requirements that exist until the regulated entity performs the act required. These cases are easily distinguished from the context of the *Volks* case and this rulemaking as the obligation to record an injury only exists for a specific time, not until it is satisfied.

³⁴ 455 U.S. 363 (1982).

One case, *United States v. Franklin*, involved the Alien Registration Act which imposes an ongoing registration obligation, making the failure to register a continuing violation.³⁵ But that is a very different statutory scheme with a very different purpose. We doubt Congress intended to put to rest an alien's liability for overstaying a visa with a short statute of limitations.

Even observing the six-month statute of limitations, OSHA will still be able to take appropriate action against employers who flout the law. Most likely there will be numerous cases that are unrecorded within the statutory period in such an investigation. But OSHA does not have to create a new and burdensome requirement for all employers because of the bad behavior of the few. Employers are not schoolchildren with the class clown hiding among them. The vast majority should not be punished for the failures of the few.

VII. OSHA's Proposed Changes Impose Significant Additional Obligations

Attempting to negate the *Volks II* decision, OSHA asserts that its proposed rule only "clarifies" an employer's obligation to make and maintain records pertaining to work-related injuries and illnesses. OSHA claims that the proposed rule does not impose any new or additional employer obligations. If this were true, the NPRM would not be required. However, based on the Court decision, the proposal does indeed establish new requirements.

The Court did not rely on OSHA's regulations to determine if a continuing violation could exist, but rather relied on the unambiguous language of the statute. That provision was included to assure that employers would receive prompt notice of violations so the conditions could be corrected.

³⁵ *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951).

OSHA could have asserted that the D.C. Circuit decision in *Volks II* was wrong, and filed a petition for *certiorari* before the U.S. Supreme Court, or even pursued an *en banc* review where the agency might have been able to benefit from the full bench now populated with many appointees of this administration. We believe OSHA decided either that the Court was correct, or that the risk of losing was too high, and that a faster and more reliable remedy was to adopt a regulation under section 8(c) of the statute. The first paragraph of that section permits OSHA to prescribe regulations to “make, keep, and preserve” records of occupational injuries and illnesses that are “necessary and appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.” Section 8(c)(2) authorizes the Secretary to “prescribe regulations requiring employers to maintain accurate injury and illness records and to make periodic reports” on those cases. While this authority is clear, it is not clear that, even under an expansive interpretation of the statute, OSHA can extend liability for violations of the recordkeeping regulation beyond six months after the “occurrence” of the triggering event.

As the D.C. Circuit said of OSHA’s reasoning, “the statute of limitations Congress included in the Act could be expanded [infinitely] if, for example, the Secretary promulgated a regulation requiring that a record be kept of every violation for as long as the Secretary would like to be able to bring an action based on that violation. There is truly no end to such madness.”³⁶

In the NPRM, OSHA proposes to amend several sections under Part 1904 of OSHA’s regulations, creating a continuing obligation to remedy any deficiencies in the records required under Part 1904. Once adopted, OSHA believes that it will be able to issue citations and

³⁶ *Volks II*, at 764.

penalties for up to six months after the end of the five-year record retention period. For the reasons cited above, we think OSHA should abandon any attempt to do so, because such an approach is not authorized by the statute.

OSHA proposes to change the language to require employers to maintain an “accurate record” of each and every fatality, injury and illness.³⁷ OSHA defines “accurate records” as records of each injury and illness that is made in accordance with the standard. OSHA proposes to add a note stating that this obligation “continues throughout the entire record retention period.” This is a bootstrap argument, that an accurate record is required, and that new information creates a continuing obligation to update the records. Even if true, such a requirement can still be interpreted in such a way as to give full effect to the six-month statutory limit. OSHA would have the opportunity to issue a citation for inaccurate records for six months from the date the new information was received. What OSHA cannot do is what it proposes: to require that on every day of a five-year plus period, the records must be “accurate” regardless of when the information was received by the employer.

In the proposed standard, OSHA persists throughout in maintaining that the employer bears on ongoing burden of maintaining accurate records for the five-year retention period. It proposes to modify §1904.29 to read that a failure to meet the seven day deadline “does not extinguish your continuing obligation to... maintain accurate records.”³⁸ This obligation, OSHA maintains, “continues throughout the entire record retention period.” Repeating an error does not correct it.

³⁷ 80 Fed. Reg. 45,130-31.

³⁸ 80 Fed. Reg. 45,131.

In the rule OSHA proposes to modify §1904.32 such that year-end reviews and annual summary requirements require the employer to modify an Incident Report Form. The proposed rule states that an employer must verify that each injury and illness that is recorded on the OSHA Form 300 is accurately recorded on a corresponding Form 301.³⁹ Practically, this must be taken to mean that OSHA intends for an employer to modify a Form 301, potentially months after that document was created. This actually creates a far more significant burden than OSHA is willing to admit and the current regulation creates an obligation to update these records, presumably within seven days, giving OSHA the same opportunity to discover violations in the course of an inspection and to broaden the review to determine if systematic non-recording is occurring. OSHA's effort to create a continuing duty does nothing to enhance the records themselves for purposes to which they are now put, and only creates more opportunity for issuing citations. Employers already have sufficient incentive to comply, and creating a punishment for the vast majority of employers who work hard to comply will not enhance OSHA's ability to discover those who do not. Thus, the regulation neither satisfies the congressional purpose nor improves OSHA's enforcement capabilities. It hardly comports with the congressional directive to minimize the burden on employers for recordkeeping when the results are so minimal.

OSHA proposes that § 1904.33 be modified to state that an employer must make any corrections to an OSHA Form 300 to accurately reflect any changes that have occurred during the five-year retention period.⁴⁰ This would not only include instances where an employer discovers that an injury was not recorded, but also corrections to the classification, description or described outcome of an injury or illness. This proposed requirement is identical to OSHA's

³⁹ *Id.*

⁴⁰ *See* 80 Fed. Reg. 45,116.

enforcement position in *Volks*, and it has been struck on the basis that it exceeds Congress' intent. Thus, the court's holding will not become moot just because OSHA goes through a rulemaking to negate it.

As pointed out by one of our member companies, in the past when OSHA performed a recordkeeping inspection at one of their sites, they asked for a myriad of information (personnel files, medical files, move records, workers compensation records, etc.) for every third active employee for the preceding five years. By allowing a five-year window, the burden of the inspection is significantly increased. This places a tremendous burden on those who keep the records and it interferes with the normal operations of the employer, to the point that the inspection can become unreasonable under the statute. Because employers would have to focus on even the smallest of discrepancies the burden is far more than OSHA estimates.

More than just the recordkeeping burden itself is involved. In addition, OSHA's inspections become more intrusive, taking an employer's staff time away from their primary jobs of supporting the safety effort to supporting OSHA's investigation. In one example from a major employer, a detailed OSHA investigation found only minor discrepancies. One of the discrepancies, for example, was a nearly three-year-old case that had marked 80 days off instead of 81. One day of missed time two years in the past should not be the basis for a citation. The fact that OSHA would disclaim an intention to issue citations in such cases is insufficient justification for allowing the rule changes to go forward. *Volks II* prevents OSHA from using these types of minor discrepancies as grounds for a citation if they are not discovered within six months of the information becoming known to the employer. This new rule will put them back into play with no benefit to employees' health and safety, and would violate the public policy that infractions have a limited life for enforcement purposes. We think it is also good public policy

that infractions that have limited impact have a correspondingly limited potential life before stale claims are allowed to expire.

Note: We are not suggesting that employers should not make such changes, only that OSHA should not be allowed to contravene the Congressional decision to limit the duration of liability for failing to do so. In light of the limited utility of records beyond the first year, OSHA's justification for importing a continuing duty to update the records throughout the five-year review period can only be to increase potential liability. We do not think OSHA can trump Congress' directive or intent. OSHA must go to Congress to change the law.

Because OSHA's estimate of time seems so wrong, we think it useful to discuss the actual mechanics of recordkeeping maintenance as reported to us by one of our members. After initial injury and documentation, the facility personnel are expected to continuously update the log with case changes for at least five years. Updates to every case must be made when any of the following changes, among others, occur:

- Updates to the case status when it changes from recordable to recordable plus restricted or plus lost days;
- Updates to the number of restricted days, lost days;
- Updates when lost days have occurred;
- When the count of restricted days and lost days end;
- Updates if an employee is removed from restricted work or lost days and returns to their normal job, but then experiences worsening symptoms that require them to be placed back on restricted duty or days away from work;
- Updates to the part of the body affected as it may evolve (e.g., shoulder to include elbow);
- Updates to the names of treating health care professionals when the injured worker sees more than one health care professional for evaluation or treatment;

- Updates to the locations where the employee was treated (e.g., if their primary care doctor recommends an orthopedist at another site);
- Whether the employee was hospitalized (e.g., for surgery at a later date);
- Incident information including what the employee was doing, the object the employee was using, etc. (as a company continues to investigate an incident, this information can become clearer).

Most of these changes would have little or no impact on the statistics of the site or on the implications for workplace safety. To what benefit would these activities accrue?

Further, over the course of a case, the number of restricted or lost days may change multiple times. This requires employers to re-enter their information and update information repeatedly. Employers do strive for accuracy but minute errors may occur due to evolving situations. Personnel will also change over time making it extremely hard to have first-hand knowledge of an incident that occurred so long ago. However, there is no substantive safety benefit from having the number exactly right for a case that is many months or even less benefit when a case is one or more years old.

OSHA's proposal states that the proposed rule would not constitute an economically significant regulatory action.⁴¹ However, if the proposal was enacted, the new rule would generate a large increase in paperwork, audits, and increased administrative time and oversight, as well as the potential for heightened liability for citations that are not intended to and will not make the workplace safer. Making changes to the log and to the underlying records are not solely a matter of retrieving the records and updating them. Even with electronic filing, there is a need for human eyes to be on the documents to assure that the information is transcribed accurately and in the right place. The changes to various sections emphasizing the need to record and report

⁴¹ Id. at 45128.

“accurate” records will cause employers to spend far more time reviewing all cases, rather than those focusing their attention on those cases that identify factors and conditions over which the employer has control and are relevant to an effective safety program.

The economic analysis only factors in costs associated with a 1percent non-compliance rate. In supporting OSHA’s prior recordkeeping rules changes OSHA has relied on data suggesting a compliance rate of significantly less than 90 percent.⁴² Either OSHA is purposely underestimating the costs, or its proposal is unnecessary because it will not affect the overall accuracy, or OSHA’s costs are off by a factor of at least 10, and perhaps much more if the studies OSHA is relying on are to be believed. Thus, it is likely that the actual cost will be 10 times OSHA’s estimated costs and effort to correct meaningless records just on the basis of the number of records to be reviewed.

As noted the proposed changes will require that all or nearly all of the cases at some point receive closer scrutiny, thus making the cost far more significant. As might be inferred from the list of changes that could require updating of the records, we believe OSHA’s estimate of 0.38 hours to review and record a case is woefully inadequate. This estimate becomes even more inaccurate as an employer reaches further back into the five-year retention period because of the need to familiarize themselves with the details in the case and to assure the correct record is being updated. Thus, OSHA is disguising a new requirement as a “clarification,” apparently to down play or camouflage the true impact the proposal will have.

⁴² 66 Fed. Reg. 5,918, 19 (January 19, 2001). In the 2001 proposed rule changes OSHA cited studies claiming to show that the magnitude of underreporting was 25-35%, and OSHA reported “serious” recording errors at 20%. *See* table, page 5919.

VIII. OSHA's Proposed Changes Impose Significant Additional Costs and Its Cost Estimate Is Based on Outdated and Inaccurate Data

Oddly, OSHA both denies that the rule will impose any cost on affected employers and, also, presents estimates of such a cost. The denial of any cost effect is based on OSHA's claim that the rule does not impose any new requirement, but merely "restates" an existing requirement. OSHA's estimate of compliance cost is prefaced by the statement, "[m]oreover, even if the proposed revisions to OSHA's recordkeeping rules would result in some costs beyond those the Agency estimated in 2001, any such costs would be nominal." OSHA then proceeds to estimate a low and high range of compliance costs: \$433,100 per year based on an estimate that annually "24,400 cases would be newly recorded as a result of the proposal;"⁴³ and \$2.2 million per year based on an estimated that annually 122,000 cases would be newly recorded as a result of the proposal.

These estimates are based, respectively on the assumptions that one to five percent of the estimated total of 2.44 million cases recorded per year would be cases recorded under the continuing reporting obligation.

OSHA provides no credible basis in empirical evidence to support either the one percent or the five percent assumption, nor do they present any logical reasoning to support the notion that these are credible parameters.

These percentages that are critical to the cost calculation appear to be capricious guesses.⁴⁴

⁴³ Id. at 45128

⁴⁴ See definition of "capricious" at Merriam-Webster Unabridged Dictionary at <http://unabridged.merriam-webster.com/unabridged/capricious> (1) "not guided by steady judgment, intent, or purpose;" (2) "lacking a standard or norm;" (3) "marked by unpredictable variation or irregularity."

The 2.44 million base number against which these capricious percentages are multiplied in the OSHA calculations itself appears to be in error. The most recent available data from BLS estimates the total number of recordable occupational injuries and illnesses in 2013 as 3.75 million, over one-half greater than the 2.44 million estimate used by OSHA based on OSHA's 2014 OMB Information Collection Request (ICR) for the OSHA injury and illness report log form 300.⁴⁵

Simply to correct the number of recordable cases by which a one percent, five percent or some other speculative percentage is multiplied is not sufficient to correct OSHA's calculation. The proposed rule defines an obligation to make or update records subsequently and continuously as information about the nature, severity and outcome of the case changes. In addition to being required to monitor already recorded cases and to update/revise those records as necessary over five years as new information is obtained, the proposed rule also defines an obligation to subsequently make new records of past incidents when new information indicates that an incident that initially was not recordable must be reclassified as recordable.

These changes in case recordable status that the proposed rule would require employers to exercise diligence to discover over a five-year period after the incident may arise from a variety of circumstances: (1) the initial injury or illness persists and later results in days away from work, restricted duties, hospitalization or other recordable circumstances that were not evident initially; (2) new information about the severity or other circumstances of the initial incident comes to light, revealing that it was incorrectly classified as non-recordable initially or

⁴⁵ See the BLS report Table 2 at <http://www.bls.gov/iif/oshwc/osh/os/ostb3960.pdf>. The 2.44 million number used by OSHA is based on OSHA's OMB ICR supporting document at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201405-1218-003 which appears to be based on outdated or erroneous data.

(3) inadvertent delays occurred in the incident reporting and evaluation process. These circumstances may occur in proportion to the total number of occupational injury or illness incidents, whether recordable or not. It is that number of total incidents, whether recordable or not, to which OSHA should refer in its calculations.

To correctly estimate the expected cost of the proposed definition of continuing obligation to monitor both recorded and previously unrecorded incidents and to revise or newly record as information and circumstances change over five years post-incident, OSHA needs to collect data regarding the total number of both initially recorded and non-recorded data and determine empirically by follow-up of a random sample of cases the incidence of circumstances necessitating new or revised record making.

Furthermore, the cost of compliance with the obligation described in this proposed rule is not limited to the time and effort to make an entry in a Form 300 log and to create the accompanying Form 301 (or equivalent) detailed description. The cost also includes the time and effort continuously required to monitor all cases, and including especially incidents previously considered non-recordable, to identify circumstances where a previously non-recorded incident has become recordable or a previously recorded incident requires addendum or revision of the record. This monitoring element of the requirement may entail costs that far exceed the simple direct recording cost element.

Before proceeding any further with this rulemaking, OSHA should conduct appropriate research to address the omitted monitoring cost component, and reconsider whether the proposed rule is economically feasible and yields net benefits in terms of worker safety and health.

Also, the time parameter that OSHA uses in its calculation of putative recordkeeping cost, 0.38 hours (23 minutes), is not based on any empirical evidence. The OMB ICR supporting statement of 2014 on which the calculation is based presents the estimated reporting time without any factual evidence or source to justify it. The number was speculative then and it remains speculative today. OSHA has it within its ability to conduct experiments, surveys, or other research to establish a credible empirical basis for its estimates of recordkeeping time.

Another source of underestimation of cost in OSHA's calculation is the omission of indirect labor and overhead costs from the unit labor cost amounts applied to the labor time estimates for compliance activities. The opportunity cost of applying labor time to regulatory compliance activity is greater than the compensation cost amounts cited. OSHA should add to these amounts additional sums to account for indirect and overhead costs. These indirect and overhead cost elements that are necessary support to direct labor hours include the cost of management and supervision, marketing, training, quality control, payroll and human resource services, facilities maintenance, IT support services, equipment furnishings, insurance, and office space, for examples. Often these overhead costs add amounts equal to 1.5 times the direct labor cost involved or more. The \$46.72 per hour direct labor compensation cost used in the OSHA calculations, should, for example, be increased to at least \$116.80 per hour in the calculation to account for overhead costs.

OSHA could examine the loaded labor rates that it pays hourly for regulatory analysis support contractor services by Eastern Research Group to gauge the relationship between direct labor compensation and fully loaded labor costs including indirect labor and overhead costs.

Finally, OSHA did not take into account either initial or continuing costs associated with electronic records systems. Many facilities manually manage their OSHA 300 and 301 forms. Some facilities may have a system that will continue the count of days but will not update case status or treatment changes automatically. A system to manage OSHA 300 and 301 logs across a large organization in the United States can cost over \$300,000/year (\$350K up front). This cost does not include training or user time. To the extent that OSHA's change causes companies to move from manual to automated systems, OSHA's cost estimate does not take this into account.

IX. OSHA's Proposal Will Not Improve Health and Safety Programs of Employers or the Agency's Enforcement Program

Contrary to OSHA's assertions, when a case remains unrecorded, lengthening the period when an employer can be cited for absence of that information in the OSHA 300 recordkeeping system will have little or no consequence to workplace safety and health. Employers will still be liable for failures to record or update records, for the full statutory period of six months, as Congress intended. OSHA will be able to cite employers so long as the information on a case, either as to its existence or as to a material fact about the case, if they do not update or add the record And OSHA issues a citation within the six-month deadline. Employers should be liable for complying with the law as Congress intended, not as OSHA would stretch the law to make it.

Moreover, the only potential impact failing to record an injury or illness within the statutory timeframe is related to the use of the injury and illness statistics by employers and OSHA and one-off errors, which will have little impact on the overall statistics. Even systematic errors in recording by a single employer do not affect the overall accuracy of the statistics on nationwide injury and illness rates that the statute contemplates. For example, not all employers

are included in the annual survey, and of those that are, it seems unlikely that more than one or two employers who systematically err in their recordkeeping in any group might be included in this survey. Indeed, it is our understanding from BLS the agency has looked at this factor and has not found it to affect the results.

As an example, one of our member companies pointed out that OSHA recently evaluated the hypothetical problem of underreporting as part of a multi-year nationwide National Emphasis Program. The program which began with the new Administration in 2009 first involved inspections of employers with high injury and illness rates. Not finding anything significant, OSHA turned to those employers with *low* rates. OSHA, however, did not find any significant underreporting in that cohort either. OSHA has never issued a report publicly on that effort, suggesting they did not find evidence of widespread and systematic underreporting to prove their hypothesis. For safety and health programs, the significance of occasional lapses or errors in recording decrease rapidly with the passage of time because the further in time the injury and illness occurred, the more likely facts and accurate accounts of the incident would not actually be captured in the log. OSHA receives annual surveys from the largest 80,000 of the more than 6.5 million covered employers and targets sites for inspection based on rates rather than individual cases early in the year following the recording period. No update to those records is going to affect the inspection targeting system based on the records. Thus, OSHA's enforcement program will be unaffected.

Systematic failures to accurately record cases have to be discovered through the normal inspection process. As we noted above and the Supreme Court said in the *Gabelli* case, "the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the

court would make the law instead of administering it.”⁴⁶ We believe the *Gabelli* case is particularly instructive, as it involved an attempt by an agency in an investigative context to extend the statute of limitations by grafting a discovery rule onto the statutory language. Similarly, characterizing a duty as a continuing obligation would extend liability beyond the congressionally mandated period.

In support of its proposal, OSHA argues that incomplete injury and illness records leave the employer, OSHA, and employees “under-informed” and, contrary to the D.C. Circuit’s rationale in *Volks II*, create “an ongoing condition detrimental to full enforcement of the Act.”⁴⁷ For the reasons stated above, this argument is simply not credible. OSHA has emphasized the need to have *current* records to prioritize enforcement activities, and has used both historical data from the BLS annual report as well as data from its own data collection initiative for both enforcement and standards development priorities and support. As stated earlier, the accuracy of neither set of records is affected by even a systematic failure to have accurate records on the part of an individual employer, and OSHA has not been able to show that there is widespread and systematic under-reporting even when it conducted special inspections under the national emphasis programs more than four years ago.

According to the Ninth Circuit Court of Appeals, Supreme Court decisions make it clear that any application of the continuing violations doctrine is an exception rather than the rule.⁴⁸ Nevertheless, OSHA asserts that the language and purpose of the Act support the adoption of a rule that would create a continuing duty to make and maintain records pertaining to work-related

⁴⁶ *Gabelli*, 133 S.Ct. 1216 (2013). OSHA thinks the case is inapposite because the government conceded that the violative conduct “concluded” five years before the complaint was filed.

⁴⁷ 80 Fed. Reg. at 45,124.

⁴⁸ *Cherosky v Henderson*, 330 F.3d 1243, 1248 (3d. Cir. 2003).

injuries and illnesses, and make the failure to perform that duty a continuing violation. OSHA supports this proposition by citing to sections 8(c)(1) (“make, keep and preserve, and make available” certain records), and 8(c)(2) of the Act (employers are to “maintain accurate records”). Without evidence from either the statute or the legislative history, indeed, in contrast to it, OSHA asserts this language connotes an ongoing obligation.

In 1970, Congress imposed an obligation to keep accurate records because of a concern that the records kept at the time underreported workplace injuries and deaths.

In spite of looking carefully several times over the last 30 years, OSHA itself has failed to unearth evidence of widespread and systematic failures to keep accurate records, inevitably undermining the Congressional belief that injuries were underreported.⁴⁹

OSHA, however, continues to believe underreporting occurs despite its own findings, which explains what OSHA is intent on bringing forth its proposal that is demonstrably unnecessary, and contrary to the explicit requirement in section 8 regarding the basis recordkeeping regulations.

Separately, Congress directed the Secretary under Section 24(a) of the OSH Act to “compile accurate statistics” of work injuries and illnesses. BLS and OSHA do not request updates from employers to the annual survey responses. Because the BLS survey is based on a statistically valid sample, BLS believes its annual report is an accurate picture of workplace cases. Moreover, neither OSHA nor BLS seek to update their annual data collection and so do

⁴⁹ In the 2001 final rule, OSHA cites studies from a number of sources suggesting as much as a 25% underreporting, accuses small businesses of consistently underreporting cases. Even if that were true, for the purposes Congress intended, a statistical adjustment similar to the BLS adjustments made to their surveys of employment statistics could be made. In any event, such adjustments do not affect the underlying trends of continuing improvement in the statistics *largely on the same path as existed before OSHA was created*. This suggests that the concern about capturing “all” cases is misplaced.

not revise the statistics in their annual surveys based on cases that are later recorded or revised. This implies that such updates are not necessary to achieve the Congressional objective.

The proposal, in lengthening the statute of limitations for when OSHA can issue a citation for failing to record an injury or illness, will not achieve safer workplaces. In fact, as more time passes from the incident, records of cases become less pertinent to safety program management by, and therefore should not be a primary focus of a safety and health program. The primary focus should be on identifying hazards and correcting them expeditiously, to prevent injuries in the first place, and an overemphasis on updating historical records so that OSHA has a “speed trap” for employers will only divert resources better spent on the substantive safety and health program aspects.

X. OSHA Has Not Complied With Executive Order 12866 Because the Proposed Change Is A Novel Legal Application of the OSHA Act and Would Undermine Judicial Authority to Rein in Agencies

Executive Order (EO) 12866 requires, among other things, that “significant regulatory actions,” which are defined to include “any regulatory action that is likely to result in a rule that may. . . [r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.”⁵⁰ While OSHA focused on the question of whether the proposal was “economically significant” it ignored entirely the question of whether the proposal raises novel legal or policy issues.

⁵⁰ Executive Order 12866, September 30, 1993, Sec 3.f.4.

We concur with the suggestion by the Coalition for Workplace Safety that this proposal triggers this prong of the E.O. 12866 definition of a “significant regulatory action.” Because of that we believe OSHA’s assessment of the impact, alternatives, costs and benefits among the principles executive agencies are directed to take into account has been less than what the Executive Order contemplates; indeed utterly lacking on the question of whether this is a novel legal issue.

Because of the broad scope of the Executive Order, we are believe OSHA has not complied with it. Clearly OSHA’s analysis falls short of what the Executive Order prescribes. Any finalization of this regulation should receive full review under E.O. 12866, specifically review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

XI. Conclusion

The NAM and Chamber appreciate the opportunity to submit these comments to OSHA’s Notice of Proposed Rulemaking on illness and injury recordkeeping regulations at 29 C.F.R. § 1904. However, based on the above concerns, it appears OSHA’s proposed rule does not “clarify” the existing Recordkeeping rule, but rather makes substantive changes that are in direct opposition to the OSH Act’s clear language, legislative history, and purpose. OSHA’s assessment of the resulting impact of the proposed rule further fails to truly consider the necessity or purpose for this rule, as well as the overall implications the implementation of this rule would have on employers. The NAM and Chamber therefore strongly encourage OSHA to withdraw this proposed regulation.

Thank you for your consideration of these comments. If you have any questions or would like to discuss this further, please let us know.

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