OSHA Proposes Changes to Recordkeeping Rule

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The Occupational Safety and Health Administration has proposed a rule intended to overcome a court ruling that barred the agency from citing an employer for failing to record an injury or illness beyond the six-month statute of limitations set out in the statute. The rule, proposed July 29, would amend 29 CFR § 1904 to clarify that an employer's duty to record an injury or illness continues for a period of five years, the length of time employers now must keep records of every recordable injury or illness. The OSHA 300 Log and 301 Incident Report forms are used for this purpose.

According to OSHA, the proposed rule adds no new compliance obligations, but includes changes to the text of some existing provisions. One potentially significant change is a revision of the definition of "occurrence" to include ongoing violations, such as an unreported injury. The proposal would not require employers to make records of any injuries or illnesses for which records are not currently required, the agency said. If the changes are adopted, states with their own OSHA-equivalent safety agencies would be expected to enact similar revisions.

"As long as an employer fails to comply with its ongoing duty to record an injury or illness, there is an ongoing violation of OSHA's recordkeeping requirements that continues to occur every day employees work at the site," OSHA said. "Therefore, OSHA can cite employers for such recordkeeping violations for up to six months after the five-year retention period expires without running afoul of the Occupational Safety and Health [OSH] Act's statute of limitations."

The agency's initiative stems from a 2012 federal appeals court ruling in which a three-judge panel held that, under the OSH Act's Section 9(c) statute of limitations provision, OSHA had no authority after six months from the date a workplace injury or illness must be recorded to cite an employer for not recording the incident. *AKM LLC v. Sec'y of Labor (Volks II),* 675 F.3d 752 (D.C. Cir. 2012).

The federal agency said it intended to overturn the holding in *Volks II* in announcing the proposed rule. "Accurate records are not simply paperwork, but have an important, in fact life-saving purpose," OSHA Assistant Secretary of Labor Dr. David Michaels said. "They will enable employers, employees, researchers and the government to identify and eliminate the most serious workplace hazards — ones that have already caused injuries and illnesses to occur."

Businesses have expressed opposition to the proposed changes and may challenge OSHA's final action in court. Although the outcome of court cases always is uncertain, it would appear the agency faces a high hurdle in overcoming the court's conclusion that "[n]othing in the [OSH Act] suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-keeping violation over employers for years, and then cite the employer long after the opportunity to actually improve the workplace has passed."

Asserting that governing federal statutes do not mandate them, OSHA has not scheduled public hearings on the proposed rule. However, the agency is taking comments through September 28. Remarks may be submitted electronically at http://www.regulations.gov. Reference Docket No. OSHA-2015-0006 and include the title of the rulemaking, "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness."

jurisdictions. Prior results do not guarantee a similar outcome.

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