

OSHA Recordkeeping Violations Subject to Six-Month Limitations; Continuing Violation Theory Rejected

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Vacating citations issued by the Occupational Safety and Health Administration for violations of the Occupational Safety and Health Act's recordkeeping requirements, the U.S. Court of Appeals for the District of Columbia Circuit has held that the citations were untimely and barred by the Act's six-month statute of limitations. *AKM LLC d/b/a Volks Constructors v. Secretary of Labor*, No. 11-1106 (D.C. Cir. Apr. 6, 2012). The Court further held that the "continuing violation" rule did not extend the statute of limitations.

Background

On May 10, 2006, the Occupational Safety and Health Administration ("OSHA") began an inspection of AKM LLC, doing business as Volks Constructors. It discovered the company had not prepared incident forms, incident logs, and year-end summaries completely or correctly from January 11, 2002 to April 22, 2006. On November 8, 2006, OSHA issued 171 citations for various recordkeeping violations and fined the company a total of \$13,300. The violations occurred between 54 months, at the earliest, and six months plus ten days, at the latest, before the citations were issued.

The company sought to dismiss the citations as untimely. An Occupational Safety and Health Review Commission (OSHRC) administrative law judge affirmed the citations, and the company appealed. OSHA argued that the citations were based on "continuing violations" that still were occurring on May 10, 2006, when the inspection began. The OSHRC affirmed its ALJ's decision, and the company petitioned the court of appeals for review.

Applicable Law

The Act requires employers to "make, keep and preserve" records of workplace injuries and illnesses. 29 U.S.C. § 657(c)(1). It includes a statute of limitations that provides, "no citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

Under OSHA's regulations, employers must record information about certain work-related injuries and illnesses in three ways. First, employers must prepare an incident report and record the injury or illness on a separate log "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." 29 C.F.R. § 1904.29(b)(1)-(3). Second, employers must prepare a year-end summary report of all recordable injuries that must be reviewed and certified by a specified company official. 29 C.F.R. §§ 1904.32(a)(1), (2), (b)(3). Third, employers must save these documents for five years following the end of the calendar year to which they relate. 29 C.F.R. § 1904.33(a).

Continuing Violation Theory Rejected

OSHA argued that the citations were timely because the violations continued every day the company failed to satisfy the regulations' recordkeeping requirements. It further argued that the Act's statute of limitations must be read in conjunction with the regulations' requirement that employers maintain records for five years. OSHA thus maintained that "the real statute of limitations" was the "record retention period plus the limitations period Congress proposed" — five years beyond the six months set forth in the Act.

The Court rejected OSHA's contention as inconsistent with the Act's plain language. It concluded that the "occurrence" mentioned in the Act's statute of limitations which started the six-month period in which OSHA could issue citations referred to a discrete event that happened in the past. Under this interpretation, the company's recordkeeping omissions and mistakes were the "events" that "occurred"

and gave rise to the violations that might be cited. Because the violations occurred more than six months before OSHA issued the citations, the citations were untimely, the Court ruled.

The Court also rejected OSHA's attempt to piggyback the Act's six-month statute of limitation on the five-year record maintenance requirement set forth in the regulations. It noted that, to the extent Congress delegated authority to OSHA to make regulations requiring employers to make, keep, and preserve records, Congress did so only within the context of the Act's statute of limitations. The Court stated, "We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it." To conclude otherwise, the Court reasoned, would lead to "absurd consequences." OSHA's interpretation would allow it to extend the statute of limitations endlessly by regulation, even "for as long as the Secretary would like to be able to bring an action based on that violation." The Court remarked, "There is truly no end to such madness."

In addition, the Court found OSHA's argument failed to follow the general principle that the continuing violation rule is an exception to the statute of limitations and was inconsistent with applicable case law. The standard rule is that a limitations period is triggered by the existence of a completed claim. The continuing violation rule generally is used only when it is unclear at the time of the occurrence that the act was unlawful. However, the company's failure to comply with the Act's recordkeeping "would be immediately apparent to an OSHA administrator." Thus, the Court concluded, Congress did not intend to depart from the general rule regarding statutes of limitations.

Finally, the Court noted that Congress' aim in creating OSHA was to improve the safety of America's workplaces, and it must have believed this goal would be served by having OSHA enforce recordkeeping violations quickly. The Court observed, "Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years, and then cite the employer long after the opportunity to actually improve the workplace has passed."

Accordingly, the Court concluded that the citations were untimely.

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This decision is a resounding rejection of the common OSHA practice of treating recordkeeping violations as continuing violations. It likely will have a major impact on the OSHA's ability to issue recordkeeping citations in the first instance, especially those alleging large-scale violations going back years, even well before the agency's inspection began. Employers who are subject to OSHA investigations should consult with counsel regarding possible challenges to untimely citations.

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