

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

HENRY MCMASTER, in his official capacity  
as Governor of South Carolina, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
LABOR, *et al.*,

Defendants.

Case No. 3:22-cv-2603-SAL

**DEFENDANTS' RESPONSE TO PLAINTIFF'S "SUPPLEMENTAL AUTHORITY"**

Defendants U.S. Department of Labor; Martin J. Walsh, in his official capacity as the Secretary of Labor; the Occupational Safety and Health Administration ("OSHA"); and Douglas Parker, in his official capacity as Assistant Secretary for Occupational Safety and Health (collectively "Defendants"), hereby file this response to Plaintiffs' "Supplemental Authority," ECF No. 32 ("Supp.") in support of their pending motion for preliminary injunction, ECF No. 8 ("Mot.).

Despite its title, Plaintiffs' filing provides no supplemental authority. The 2023 adjustment is, Plaintiffs concede, "essentially identical to previous annual adjustments in substance." Supp. 1. The email that they attach is likewise identical to the automated emails that accompany every annual adjustment; Plaintiffs could, therefore, have cited the 2022 equivalent in their motion or reply brief. *See* Ex. 1 (Jan. 18, 2022, Email to State Plans). And the only new *authority* cited by Plaintiffs is a case decided in 2010, long before Plaintiffs brought suit. Because none of this is "supplemental authority," it cannot buttress Plaintiffs' arguments.

As if to prove the point, Plaintiffs merely repeat those arguments in their filing. For example, Plaintiffs emphasize that the 2023 Adjustment, like its predecessors, is denominated a "final rule." The Parties have already addressed that point. *See* Mot. 13–14; Pls. Reply 7, ECF No. 22; Defs. Reply 5–7, ECF No. 25. To reiterate briefly: whatever an agency's publication is titled, the relevant question is whether it had "an immediate and practical effect." *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 433 (4th Cir. 2010)). In this case, the only challenged portion of the 2022 Adjustment is three paragraphs addressing federalism concerns, under "Other Regulatory Considerations" at the end of the publication. As Defendants have briefed and argued at length, those paragraphs merely set forth preexisting legal authority; they have no legal effect and could be excised without affecting any State plan's legal obligations. Accordingly, those paragraphs are not "agency action" amenable to challenge under the APA. *See* Defs. Opp'n 15–17 (citing, e.g., *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004); *Golden & Zimmerman, LLC*, 599 F.3d 426).

Plaintiffs now rely on an email to argue that the 2022 adjustment is "final agency action" under 5 U.S.C. § 704. Supp. 2–3. But that language is identical to emails in years past; it is not "supplemental authority." *Compare* Supp. 2–3 ("The 2023 Adjustment 'imposes additional or more stringent requirements on employers than existing OSHA standards.'") (citing Supp. Ex. 1,

Feb. 13, 2023, Declaration of Gwen Thomas)) *with* Ex. 1 (Jan. 18, 2022, Email to State Plans) (same). Nor is the proposition in those emails remarkable: the inflation-based adjustments are, of course, *increases* to existing penalty amounts. *See, e.g.*, 2022 Adjustment, 87 Fed. Reg. at 2,328–30 (making clear that penalties would be higher under the 2022 Adjustment than under its predecessor). Plaintiffs still miss the point: those are increases to *federal* penalties—that is, penalties imposed by OSHA itself. South Carolina’s *State* penalties must be at least as high as OSHA’s, but that is not because of the federal adjustments or any “mandate” within them. It is because of the OSH Act and its implementing regulations. *See* 2023 Adjustment, 88 Fed. Reg. at 2213 (“State Plans are required to increase their penalties in alignment with OSHA’s penalty increases to maintain at least as effective penalty levels.”) (citing, for that proposition, 29 U.S.C. § 667(c)(2); 29 C.F.R. §§ 1902.4(c)(2)(xi), 1902.37(b)(12)).

Finally, Plaintiffs repeat that they should not have to face withdrawal of final approval before challenging OSHA’s regulations through judicial review provided by the OSH Act, 29 U.S.C. § 667(g). Again, the Parties have already addressed this point—*see* Defs. Opp’n 18–19, ECF No. 19; Pls. Reply 3–4; Defs. Reply 7–8—and the sole cited case is not “supplemental authority,” but rather a case decided twelve years ago. *See* Supp. Mem. 3 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010)).

For the reasons previously briefed and argued, Plaintiffs’ motion should be denied.

Dated: February 17, 2023

Respectfully submitted,

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# **Exhibit 1**

**Lynch, Jason (CIV)**

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**From:** SPAadmin@osha.gov  
**Sent:** Tuesday, January 18, 2022 7:12 AM  
**To:** Tanner, Paul - OSHA  
**Subject:** Standard Log Entry Memo: Final Rule on the Department of Labor Civil Penalties for Inflation Adjustment Act - Annual Adjustment for 2022 29 CFR Part 1903

This is an E-mail notification from the State Plan Application (SPA).

Standard: Final Rule on the Department of Labor Civil Penalties for Inflation Adjustment Act - Annual Adjustment for 2022 29 CFR Part 1903 Standard Promulgation Date: 15-JAN-22 Response Due Date: 15-MAR-22 Adoption Due Date: 15-JUL-22 FR Internet Link:  
 Supplemental Link:

**State Plan Requirements:**

State Plan Requirements: Notice of Intent and Adoption Required. On 01/14/2022, the Department of Labor published a Federal Register notice on the Final Rule on the Implementation of the 2021 Annual Adjustment to Civil Penalties for Inflation, effective 01/15/2022. Since this final rule imposes additional or more stringent requirements on employers than existing OSHA standards, State Plans must adopt an "at least as effective" standard or amendment to their existing standards, or show that they already have an existing "at least as effective" standard, within six months of the standard's publication date. Within 60 days of the publication date of this standard, State Plans must respond with notice of intent, which should indicate if the State Plan will adopt, either identically or different, or if the State Plan will not adopt because it already has an existing "at least as effective as" standard. Documentation of State Plan adoption, either identical or different, must be submitted within 60 days of the adoption. For a State Plan that adopts or has an existing different standard, the required documentation is a plan change supplement, including an electronic copy of the standard and comparison document identifying and justifying the differences between the State Plan and federal standards. States Plans must either post its identical or different standard on its website and provide a link to OSHA or provide information on how the public may obtain a copy. The effective date for a State Plan standard may be no later than the date of state promulgation or the federal effective date, whichever is later. OSHA will post summary information of the responses on its website. State Plans may enter their responses, as well as the link/contact information, directly in SPA or work with their Regional State Plan Monitor to do so. The 01/14/2022 Federal Register notice is located at <https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.federalregister.gov%2Fdocuments%2F2022%2F01%2F14%2F2022-00144%2Fdepartment-of-labor-federal-civil-penalties-inflation-adjustment-act-annual-adjustments-for-2022&data=04%7C01%7CTanner.Paul%40dol.gov%7C4f74ce368e6e4450ba2008d9daa5ab69%7C75a6305472044e0c9126adab971d4aca%7C0%7C0%7C637781227340702053%7CUnknown%7CTWFPbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sd=ata=8Gj7z3OKtqQm6nYpWUgfmNi2zhmTonSxAJJrtjOoJAU%3D&reserved=0>

**State Plan Response Instructions:**

State Plan response on intent to adopt is due by 15-MAR-22 and State Plan adoption must be completed by 15-JUL-22. State Plans should enter responses directly into SPA at <https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fportal.osha.gov%2Fspa&data=04%7C01%7CTanner.Paul%40dol.gov%7C4f74ce368e6e4450ba2008d9daa5ab69%7C75a6305472044e0c9126adab971d4aca%7C0%7C0%7C637781227340702053%7CUnknown%7CTWFPbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sd=ata=egAvZDP8Q>

u%2FsytSyF8KREanGjlpkfI6m6LWhQwn%2FURc%3D&reserved=0. Please contact your Regional State Plan Monitor if you need assistance.