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OSHA Docket Office
Docket No. OSHA-2013-0023
U.S. Department of Labor
Room N-2625
200 Constitution Ave., NW
Washington, DC 20210

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

Re: Comments on OSHA Docket No. OSHA-2015-0006; Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness (80 Fed. Reg. 45116, July 29, 2015)

To the Docket:

The American Health Care Association and the National Center for Assisted Living ("AHCA/NCAL") thanks OSHA for the opportunity to comment on the Agency's proposed rule, *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness* (80 Fed. Reg. 45116, July 29, 2015).

The mission of AHCA/NCAL is to improve lives by delivering solutions for quality care. As the nation's largest association of long-term and post-acute care providers, AHCA/NCAL advocates for quality care and services for frail, elderly, and disabled Americans. Our members provide essential care to approximately one million individuals in 12,000 not-for-profit and proprietary member facilities.

A. Background

In this rule, OSHA is proposing to add language to its recordkeeping requirements (29 C.F.R. 1904) clarifying that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. (80 Fed. Reg. 45116, July 29, 2015). As stated by the Agency, "The duty to record an injury or illness continues for as long as the employer must keep records of the recordable injury or illness; the duty does not expire just because the employer fails to create the necessary records when first required to do so." *Id.* at 45116.

OSHA is proposing these changes in response to a decision of the U.S. Court of Appeals for the District of Columbia Circuit, *AKM LLC v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012) ("*Volks*"), which concluded that the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act") does not authorize the Agency "to cite the employer for a record-making violation more than six months after the recording failure." 675 F.3d at 758. In *Volks*, OSHA tried to cite an employer for inaccurate recordkeeping entries beyond the six month statute of limitations. The employer challenged that, based on the plain language of the OSH Act. On review, the Court of Appeals for the D.C. Circuit agreed with the employer and found that the Agency had overstepped its congressional authority.

It is this decision – and the impact that it had on OSHA's enforcement authority – that is at issue in the proposed rule. AHCA/NCAL agrees with OSHA that accurate injury and illness records serve an important purpose and that such records are necessary for employers to manage their safety and health programs. However, agency action is confined to the authority granted it by Congress. Here, as set forth fully below, AHCA/NCAL believes that OSHA has exceeded its statutory authority and should withdraw the proposed rule.

A. Section 9(c) clearly provides a definitive statute of limitations.

In clear and unambiguous language, Section 9(c) of the OSH Act states, "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 689(c).

In this proposed rule, OSHA attempts to circumvent the statute of limitations by claiming that the duty imposed by Congress for the Secretary to promulgate regulations requiring employers to "make, keep and preserve" records justifies a continuing obligation for recordkeeping. 80 Fed. Reg. at 45120. However, as the U.S. Court of Appeals for the D.C. Circuit stated in *Volks*:

> [t]o the extent Congress delegated authority to the Secretary to require employers to 'make, keep and preserve,' records in Section 657(c), it did so only within the ambit set by the statutory scheme, including the limitations period in Section 658(c) – which expressly applies to 'any regulations prescribed pursuant to this chapter,' such as those promulgated pursuant to Section 657(c).

675 F.3d 752, 755 (D.C. Cir. 2012).

Section 8 simply does not provide the statutory authority that OSHA claims it does. Any argument to the contrary is in direct conflict with the decision in *Volks*, which held that the statute is clear. Congress contemplated a definitive statute of limitations in the OSH Act for citations of all regulations and standards. 29 U.S.C. § 658(c).

Under the Agency's position, OSHA could effectively extend the statute of limitations to any time period it prescribes in a regulation, a position that Congress clearly rejected when promulgating the OSH Act:

> The House amendment 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

Statement of the Managers on the Part of the House, 91st Cong., 2d Sess. (1970), reprinted in Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1185.

In holding citations are untimely if issued after the six month statute of limitation, the U.S. Court of Appeals for the District of Columbia Circuit was unwavering in that "…the statute is clear." 675 F.3d at 754. There is nothing for OSHA to interpret, there is no vagueness in the statute, no gap filling that is required. This should be the end of the issue. Nevertheless, OSHA is attempting to undo the decision in *Volks* by simply adding language to the current recordkeeping regulations regarding an employer's continuing obligation to keep records.

B. Because congressional intent is clear any final rule will violate the Administrative Procedures Act.

Section 706(2) of the Administrative Procedures Act ("APA") states:

> The reviewing court shall…hold unlawful and set aside agency action…found to be
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right….

5 U.S.C. § 706(2).

Under the APA, agency action which exceeds statutory authority must be set aside. *Id.* In responding to the Secretary's argument in the *Volks* case, the court found, "the text and structure of the Act reveal a quite different and *quite clear* congressional intent that requires none of the strained inferences [the Secretary] urges upon us." *Id.* at 755 (emphasis added). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843, n.9. Here, should OSHA finalize this rule it will certainly be exceeding its statutory authority because according to *Volks*, Congress has spoken on this precise issue. *Id.* As such, any final rule will violate the APA.

C. Brand X holds that the decision in Volks forecloses any agency action on this issue.

OSHA is bound by a prior judicial precedent where it has been determined that Congress' intent is clear and the agency's position is not entitled to deference. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv.* 545 U.S. 967 (2005). The court in *Volks* heard and considered the very arguments the Agency is now making to support this proposed rule. The court ultimately rejected the Agency's position, the same position it now relies on here. *Id.* at 756, 758. ("...the Secretary's argument here is instead grounded on the faulty logic that the mere existence of a statutory provision authorizing her to require employers to make and keep records, 29 U.S.C. § 657(c), creates a continuing obligation that expands the statute of limitations."). Under *National Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X")*, the *Volks* decision controls, precluding these regulations. 545 U.S. 967 (2005).

Pursuant to *Brand X,* a prior judicial decision is controlling where the court's "construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

> Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

Id.

"The fact that a statute is unambiguous means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *Home Concrete & Supply, LLC.*, 132 S. Ct. 1836, 1843 (2012) (internal citation omitted). In *Home Concrete & Supply*, the Supreme Court bound by its prior judicial decision in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), rejected the Government's argument that a newly promulgated regulation interpreting the statute's language was entitled to deference. The Supreme Court stated,

> The question is whether the Court in Colony concluded that the statute left such a gap. And in our view, the opinion (written by Justice Harlan for the Court) makes clear that it did not.
>
> Given principles of stare decisis, we must follow that interpretation. And there being no gap to fill, the Government's gap-filling regulation cannot change Colony's interpretation of the statute.

132 S. Ct. at 1844.

Similarly, here, this proposed rule and even a final rule cannot change *Volks'* reading of the OSH Act. Section 8(c) does not authorize a continuing duty to record an injury or illness for as long as the employer must keep records of the recordable injury or illness. *Volks*, 675 F.3d 752. And, according to *Brand X*, OSHA is bound by the decision in *Volks*.

E. Conclusion.

Consistent with the holding in the *Volks* decision, AHCA/NCAL members believe the language in Section 9(c) is clear and unambiguous and recordkeeping violations do not continue for the duration of the retention period. For all the reasons stated above, AHCA/NCAL and its members strongly urge OSHA to reconsider this proposed rule, in light of the concerns raised in these comments.

Sincerely,

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