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OSHA Docket Office
Docket ID—OSHA—2015—0006
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, NW
Washington, DC 20001

VIA ELECTRONIC SUBMISSION

Re: Docket No. OSHA–2015–0006 Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Notice of Proposed Rule

Dear Docket Clerk:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am submitting the attached comments on the Occupational Safety and Health Administration's (OSHA or Agency) Notice of Proposed Rulemaking (NPRM) on the Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness (Recordkeeping Clarification NPRM) that was published in the Federal Register on July 29, 2015.[1] NAHB thanks OSHA for granting stakeholders an additional period of time to submit comments in this important matter.[2]

As an interested stakeholder in this regulatory activity, NAHB believes that OSHA's proposed "clarification" to the recordkeeping rule impermissibly expands Section 9(c) of the Occupational Safety and Health Act of 1970 (OSH Act), as well as flies in the face of the U.S. Court of Appeals for the D.C. Circuit decision in *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012) (hereafter *Volks*) and will, therefore, have a substantial adverse impact on regulated employers and small businesses, including home builders and specialty trade contractors.

NAHB is a Washington, D.C.-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's

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[1] 80 Fed. Reg. 45,116.
[2] OSHA extends comment period for proposed rule clarifying employers' continuing obligation to make and maintain accurate records of injuries, illnesses, Press Release (Sept. 21, 2015) (comment period extended to Oct. 28, 2015) (Press Release available at: https://www.osha.gov/newsrelease/trade-20150921.html).

builder members construct about 80 percent of the new housing units, making housing a large engine of economic growth in the country. Because this revised regulation could impact the activities of a significant number of our builders and remodelers, any revisions to OSHA's safety regulations and standards could have a substantial effect on the home building industry. NAHB's members make safety a priority by regularly taking steps to reduce or eliminate safety hazards on the job and comply with OSHA's regulations and standards, including maintaining accurate work-related injury records.

Additionally, NAHB is also a member of the Coalition for Workplace Safety (CWS), which is comprised of a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone's concern and improving safety can only happen when all parties—employers, employees, and OSHA—have a strong working relationship. The CWS has been dedicated to advocating the interests of its members in the regulatory debate on numerous OSHA rulemakings and has also responded to the Recordkeeping Clarification NPRM with a careful and thorough analysis. In addition to these comments, NAHB adopts and incorporates by reference the CWS comments.

For the reasons outlined below, NAHB opposes OSHA's proposal and requests the Agency to comply with Section 9 of the OSH Act and withdraw the proposed rule immediately.

I. Introduction

OSHA's 29 CFR Part 1904, Recording and Reporting Occupational Injuries and Illnesses, requires employers to record information about certain injuries and illnesses occurring in their workplaces, and to make that information available to employees, OSHA, and the Bureau of Labor Statistics (BLS). Specifically, employers with more than ten employees and whose establishments are not classified as a partially exempt industry must record work-related injuries and illnesses using OSHA Forms 300, 300A and 301. Employers must record work-related injuries and illnesses that meet one or more recording criteria, including injuries and illnesses resulting in death, loss of consciousness, days away from work, restricted work activity or job transfer, medical treatment beyond first aid, or a diagnosis of a significant injury or illness by a physician or other licensed health care professional.[3] A qualifying work-related injury or illness must be recorded within seven (7) calendar days of an employer receiving information that a recordable injury or illness has occurred.[4]

Currently, the agency is barred from citing an employer for failing to record an injury or illness beyond the six-month statute of limitations set out in the OSH Act. The proposed rule 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.[5]

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

[3] 29 CFR 1904.7.
[4] 29 CFR 1904.29.
[5] 29 CFR 1904.33.

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

II. OSHA Does Not Have the Statutory Authority to Promulgate This Regulation.

There is no ambiguity in the statute regarding the statute of limitations that warrants OSHA's expertise in "clarifying" the recordkeeping requirements. OSHA's proposal runs contrary to the OSH Act because OSHA lacks the statutory authority to promulgate a regulation that changes a clear statutory mandate with respect to an employer's recordkeeping obligations.[6] OSHA contends that recordkeeping obligations are a "continuing" duty under the OSH Act, and subject to a longer statute of limitations than that clearly set forth in the OSH Act. Despite clear statutory language on a 6 month statute of limitation, OSHA presents its position as "longstanding" and that this NPRM is simply the means to clarify its position.[7]

These arguments are unavailing, without statutory support, and contrary to law. There is no ambiguity in the statute and for OSHA to argue these recordkeeping violations are "continuing" is grossly misleading to the public and does a disservice to an agency charged with protecting workers.

A. OSHA is attempting to impermissibly expand Section 9(c) of the OSH Act.

The OSH Act is clear when it states, "*[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.*"[8] Accordingly, OSHA does not have the authority to expand the clear language of the statute to create a "continuing violation." OSHA tries to link its "continuing violation" argument to the purpose of the OSH Act, which is "to assure, so far as possible, safe and healthful working conditions by providing for appropriate reporting procedures that will help achieve the objectives of the Act and 'accurately describe' the nature of the occupational safety and health problem."[9] However, there is no continuing risk of danger present with respect to recording an injury or illness *up to 7 days after it occurs*.[10] If there was, OSHA regulations would not allow up to 7 days to elapse before the recording occurs. Failing to record does not subject a worker to additional health risks on the job. It is a ministerial function—purely paperwork—rather than a safety issue tied to using a specific piece of equipment. OSHA analogizes it to failing to provide machine guards which could be a continuing violation, and this could be true if a worker is subsequently using that machine when it is unguarded. But failing to record an event that *occurred in the past* is not the same as an ongoing potential risk of future injury. And the U.S. District Court for the D.C. Circuit agreed.

The *Volks* court recognized that the statute is clear on this point when it stated, "the word "occurrence" clearly refers to a discrete antecedent event—something that 'happened' or 'came to pass' 'in the past.'"[11] This is particularly true in the context of reporting statutes where courts have held, "*so long as the reporting need not occur within a certain time span*, a failure to report certain

[6] 29 U.S.C. 658(c).
[7] 80 Fed. Reg. at 45,119.
[8] 29 U.S.C. § 658(c) (emphasis added). While OSHA relies on Section 8(c) to support its position that the making and retention of illness and injury records is an ongoing obligation, nothing in the Legislative History of that section supports OSHA's position.
[9] 80 Fed. Reg. at 45,190.
[10] 29 CFR 1904.7.
[11] *Volks,* 675 F.3d at 755.

conditions will generally constitute a continuing violation for so long as the failure to report persists."[12] But here, the reporting requirement *is* within a certain time span—up to 7 days—and therefore does not qualify as a "continuing violation."

OSHA attempts to bolster its position that failing to record is a continuing violation by using examples given in Justice Garland's concurring opinion in *Volks,* and incorporating them directly into the Recordkeeping Clarification NPRM, to support its contention that the court recognized there *could* be continuing violations under certain circumstances.[13] However, analogizing to continuing violations in the areas of failing to pay child support, failing to register as a sex offender, failing to return to prison after escaping federal custody, and failing to provide disclosures to borrowers under the federal Truth-in-Lending Act are completely different from the singular act of failing to record an injury or illness that happened in the past.[14] And Justice Garland recognized this in his concurring opinion when he stated,

> These regulatory and statutory violations cannot be distinguished from the ones before us on the ground that they involved repeated acts rather than continuing failures to act. They do not. Instead, they are distinguishable because in each case it is reasonable to read the provision at issue as imposing a continuing obligation. Here, by contrast, such a reading is *simply implausible.*[15]

OSHA's position in this Recordkeeping Clarification NPRM, in which it makes the same arguments as it did during the *Volks* litigation, remains simply implausible.

OSHA had the opportunity to seek a rehearing *en banc,* and depending on that outcome, to then seek a petition for *certiorari* to the U.S. Supreme Court. But OSHA did not take these steps to seek clarification or advance its legal theory. Instead, it waited several years, and then submitted this proposed rulemaking in a blatant attempt to circumvent an unfavorable court decision.[16]

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[12] *Interamericas Investments, Ltd. v. Bd. of Governors of the Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997) (emphasis added); *see Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 502 n. 15 (1968) (explaining that, unlike a violation that must occur within some specific and limited time span, the violation of the Sherman Act at issue was conduct that inflicted continuing and accumulating harm on the plaintiff).

[13] *See, e.g., Volks,* 675 F.3d at 762 (J. Garland Concurring Opinion); 80 Fed. Reg. at 45,119.

[14] 80 Fed. Reg. at 45,119.

[15] *Volks,* 675 F.3d at 764 (emphasis added).

[16] If OSHA moves forward with this rulemaking and issues a final rule, it is likely that OSHA may also attempt to justify its position by relying on the Advisory Committee on Construction, Safety and Health (ACCSH), which voted to approve the proposed regulation. ACCSH is the continuing advisory body established by under Section 3704(d) of the Contract Work Hours and Safety Standards Act to advise the Assistant Secretary for Occupational Safety and Health with respect to setting construction standards and policy matters. ACCSH is composed of 15 members with the OSHA Assistant Secretary appointing five to represent employers, five to represent employees, two to represent State safety and health agencies, two to represent the public, and one member to be designated by the Secretary of Health and Human Services. OSHA's proposal ignores the fact that not all of the ACCSH representatives supported the prosed rulemaking and in fact all five *employer* representatives specifically voted against the measure. [Amended Transcript, Meetings of The Advisory Committee on Construction Safety and Health (ACCSH), December 4, 2014, by Diversified Reporting Services, Inc., U.S. Department of Labor, Occupational Safety and Health Administration (available at http://www.regulations.gov/#!documentDetail;D=OSHA-2014-0007-0090 (accessed September 17, 2015)].

OSHA's position is baseless and without legal support in the statute. Moreover, OSHA's actions are deeply troubling in this instance, particularly in light of the Federal Circuit's unequivocal statements that the Secretary of Labor's interpretation was unreasonable. Accordingly, OSHA should withdraw the Recordkeeping Clarification NPRM immediately.

B. OSHA lacks statutory authority pursuant to Section 9.

The OSH Act is clear with respect to limiting the Agency's ability to issue citations.[17] The text of the statute is unequivocal, and thus should not be subject to the Agency's interpretation when implementing it.[18] This is particularly so since the federal circuit explicitly found the Secretary of Labor's position on this point unsupportable. NAHB is not sure how much clearer the statute could be. Yet OSHA refuses to follow the law and recognize the statute's clear parameters. Instead, it seeks to use the rulemaking process to achieve the result it wants: that failing to comply with the recordkeeping requirements constitutes a "continuing violation."

In reality, the *Volks per curiam* opinion recognized the OSH Act was unambiguous on this point and found the Secretary of Labor's position without merit.[19] Tellingly, the court noted that "[d]espite the cloud of dust the Secretary kicks up in an effort to lead us to her interpretation, the text and structure of the Act reveal a quite different and quite clear congressional intent that requires none of the strained inferences she urges upon us."[20] Specifically, the court stated, "[t]he Secretary's reasoning is not persuasive enough to overcome the 'standard rule' that the limitations period is triggered by the existence of a complete cause of action, '[u]nless Congress has told us otherwise in the legislation at issue.'"[21] But Congress has not done so, and accordingly, OSHA's alleged "longstanding policy" encapsulated in the Recordkeeping Clarification NPRM is completely without support in the law and without merit. Nothing has changed from its position in *Volks* which the court soundly rejected when it held, "[t]he Act clearly renders the citations untimely, and the Secretary's argument to the contrary relies on an interpretation that is neither natural nor consistent with our precedents."[22]

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[17] 29 U.S.C. 658(c).
[18] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,467 U.S. 837 (1984),
[19] *See, e.g.,* 675 F.3d at 756 ("The Secretary's interpretation of these two provisions, by contrast has several flaws. First, it leaves little room for Section 658(c), and we must be 'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law …. Second, the Secretary's interpretation incorrectly assumes that the obligation to maintain an existing record expands the scope of an otherwise discrete obligation to make that record in the first place. But the two obligations are distinct; one cannot keep what never existed; a company cannot retain a record it never created …. Third, the Secretary essentially asks us to conclude that the mere authorization to issue regulations governing the creation and preservation of records justifies an inference that Congress intended violations of record-*making* requirements to be treated as continuing violations.").
[20] 657 F.3d at 755.
[21] *Id.* at756-57.
[22] *Volks,* 657 F.3d at 759.

III. OSHA Is Bound By The Decision in *Volks*.

OSHA's attempts to change the legislation to suit its "longstanding policy" are without legal authority. Only Congress has the ability to legislate,[23] and the Recordkeeping Clarification NPRM is a thinly disguised attempt to change an existing statute. OSHA's attempts to do in this rulemaking what it could not do through the judicial branch should be rejected. Attempting to push through its own will impermissibly violates the separation of powers written into the U.S. Constitution. The Agency's position is without merit, without legal authority, and must be withdrawn.

A. OSHA's attempt to circumvent legal precedent is contrary to the law.

In promulgating this proposed rule, OSHA not only ignores the Circuit's holding in *Volks,* but also U.S. Supreme Court precedent. It is well established that when the judiciary issues a decision interpreting an Agency's statute and that decision holds the statute is clear and unambiguous the Agency is foreclosed from rulemaking on that issue.[24] In *National Cable & Telecommunications Ass'n v. Brand X Internet Services* ("Brand X"), the Supreme Court held that when a prior court's ruling is based on the plain language of the underlying statute an Agency is bound by that prior decision and cannot use rulemaking as a means to circumvent the decision. [25]

Here, the court in *Volks* addressed the same interpretation that OSHA alleges in this NPRM supports its position for a continuing duty. The court unambiguously stated, "…the statute is clear" and found that "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."[26] OSHA is bound by the decision in *Volks*.

B. *Volks* does not support OSHA's position.

OSHA is attempting to use the rulemaking process to circumvent a negative court decision that found recordkeeping violations were not "continuous violations" under the OSH Act. Equally disturbing is OSHA's mischaracterization of parts of the *Volks* decision. OSHA argues that Judge Garland's concurring opinion in *Volks* "recognized that the OSH Act allows for continuing violations of recordkeeping requirements."[27] To get around the clearly unfavorable *Volks* decision, OSHA uses the Administrative Procedure Act[28] to push through its discredited theory that "[r]ecordkeeping violations under the OSHA Act are [ ] continuing violations."[29]

But courts don't favor statutes with "continuing violation" principles unless there is some clear intent on the part of Congress that it be that way. The court in *Volks* conducted a thorough analysis of the continuing violations theory, which the Secretary tried to tie to the 5 year record retention requirement, and ultimately concluded that the Secretary's position on this would create

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[23] U.S. Const. art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
[24] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Serv*. 545 U.S. 967 (2005).
[25] *Id.*
[26] *Id.* at 754-55.
[27] 80 Fed. Reg. at 45,119 (citing *Volks,* 675 F.3d at 759-64).
[28] 5 U.S.C. §§ 701, *et seq.*
[29] 80 Fed. Reg. at 45,119.

"maddening" results because, under the Agency's theory, the limitations period would extend *ad infinitum.*[30]

Further, the court found the Secretary's argument was "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."[31] The court recognized that such an interpretation would have "absurd consequences" and could continue without end if "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."[32]

Despite the court's unequivocal holding, OSHA seeks to push through its discredited "continuing violation" theory for failing to record injuries or illnesses by completely disregarding the OSH Act's six month statute of limitations provision. However, as the court recognized, under OSHA's "continuing violation" theory, there would be no end to an employer's obligation to continuously review past work-related injuries or illnesses, on a rolling basis for five years; that means that each day—and every day—for five years, an employer would have to repeat that effort daily for *all* of his records to ensure they are still correct. Every construction company would be subject to this "madness." This would create an impossible compliance burden for employers to meet and would truly create the "madness" the D.C. Circuit rejected in *Volks.*

OSHA's position is especially troubling given that "[t]he very purpose of a period of limitation is that there may be, at some definitely ascertained period, an end to litigation."[33] Such limitations periods are designed to provide "finality of outcome, regardless of the merits of the claim."[34] They protect citizens against stale or unduly delayed claims[35] and inform citizens when the government can no longer bring an enforcement action, thereby encouraging the government to act in a reasonable period of time.[36] Yet OSHA's proposed rule would extend the period for recording a covered injury or illness well beyond the six months Congress intended.

Tellingly, OSHA is now using the Recordkeeping Clarification NPRM to advance the same theories that were unsuccessful at the judicial level, by contending that this is merely a "clarification" of its existing regulations. This position is misleading, disingenuous, and flies in the face of contrary legal precedent, which OSHA chose not to appeal. Indeed, the court in *Volks* noted that,

> The Secretary's interpretation also runs afoul of our precedents. Her approach would stitch the retention and creation obligations into one continuing obligation, but we have stated in no uncertain terms that the 'lingering effect of an unlawful act is not itself an unlawful act' … and that the 'mere failure to right a wrong … cannot be a continuing wrong

[30] *Volks,* 657 F.3d at 758.
[31] *Id.* at 758.
[32] *Id.*
[33] *Reading Co. v. Koons,* 271 U.S. 58, 65 (1926);
[34] *Carter v. Wash. Metro. Area Transit Auth.,* 764 F.2d 854, 857 (D.C. Cir. 1985).
[35] *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133 (2008).
[36] *Reading Co.,* 271 U.S. at 65; *John R. Sand & Gravel Co.,* 552 U.S. at 133.

> which tolls the statute of limitations,' for it if were, 'the exception would obliterate the rule[.][37]

Moreover, "the mere requirement to save a record cannot possibly impose a continuing affirmative duty to correct past failures to make the record in the first place."[38] It also chastised an attempt by the Secretary of Labor to find supportive circuit law when the Secretary "resort[ed] to modifying a quotation which, properly quoted, is perfectly consistent" with the court's conclusion.[39]

OSHA's reliance on Judge Garland for support of its position in the proposed rulemaking is similarly misplaced. What the Agency ignores is Judge Garland's determination that "the Secretary's contention—that the regulations that Volks was cited for violating support a 'continuing violation' theory—is not reasonable."[40] Judge Garland concluded by stating, "because none of the challenged citations were issued within six months 'following the occurrence of any violation,' 29 U.S.C. § 658(c), I agree with my colleagues that the petition for review should be granted and the citations vacated."[41]

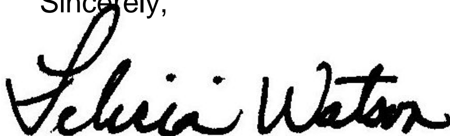
IV. OSHA Must Withdraw the Recordkeeping Clarification NPRM.

As discussed above, the Recordkeeping Clarification NPRM runs contrary to the OSH Act, and therefore must be withdrawn. Moreover, OSHA does not have the statutory authority to promulgate a regulation that changes a clear statutory mandate with respect to an employer's recordkeeping obligations.[42] OSHA had the opportunity to solidify its position through the judicial branch by appealing the *Volks* decision, but it chose not to do this. Absent a legislative fix by Congress, OSHA cannot ignore the judicial decision which found its position without merit and "simply implausible."

For all of the foregoing reasons, NAHB urges OSHA to reconsider its position, and withdraw the Recordkeeping Clarification NPRM immediately.

Please contact me at 202-266-8229 or via email at fwatson@nahb.org or NAHB's Assistant Vice President of Labor, Safety and Health Policy, Robert Matuga, at (202) 266-8507 or via email at rmatuga@nahb.org if you have any questions or require any additional information.

Sincerely,



Felicia Watson
Senior Counsel

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[37] *Id.* at 757.
[38] *Volks,* 657 F.3d at 757 (citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989) ("[A] claim … wholly dependent on … conduct occurring well outside the period of limitations … cannot [support] a continuing violation.").
[39] *Volks,* 657 F.3d at 757-58.
[40] *Id.* at 764.
[41] *Id.*
[42] 29 U.S.C. 658(c).