CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

OSHA UPDATE

CHAIRS, OSHA PRACTICE GROUP
William K. Principe, *Atlanta, GA*
Patrick R. Tyson, *Atlanta, GA*

EDITOR IN CHIEF
Robin Shea
Winston-Salem, NC

CHIEF MARKETING OFFICER
Victoria Whitaker
Atlanta, GA

Atlanta • Asheville • Austin • Birmingham • Boston • Chicago • Columbia • Dallas • Fairfax • Greenville • Jacksonville • Kansas City • Lakeland • Los Angeles County • Macon • Madison • Nashville • Port St. Lucie • Princeton • St. Louis • Tampa • Ventura County • Winston-Salem

www.constangy.com
Toll free 866.843.9555

DISTRICT OF COLUMBIA COURT OF APPEALS RULES AGAINST OSHA IN RECORDKEEPING CASE

The United States Court of Appeals for the District of Columbia Circuit ruled on April 6 that OSHA has only six months to cite an employer for recordkeeping violations from the date that an employer failed to record an injury or illness on an OSHA 300 Log. This decision overrules a recent Occupational Safety and Health Review Commission decision, *Secretary of Labor v. AKM LLC d/b/a Volks Constructors (2011)*, which had held that recordkeeping violations were "continuing violations" in the sense that every day an OSHA 300 Log was inaccurate constituted a continuing violation. The immediate effect of the D. C. Circuit's decision is that, when an injury or illness occurs that an employer should have recorded within seven calendar days of receiving information that a recordable case has occurred, OSHA has only six months from that date to issue a citation alleging a recordkeeping violation. Needless to say, this is a very significant decision because it dramatically shortens the time that an employer may be cited for OSHA injury and illness recordkeeping violations.

Section 9(c) of the OSH Act, what is referred to as the statute of limitations section, provides that "No citation may be issued . . . after the expiration of six months following *the occurrence of any violation*" (emphasis added). OSHA has consistently taken the position over the years that employers have a continuing obligation to maintain accurate OSHA 300 Logs and OSHA 301 forms for the present calendar year and for the five preceding calendar years. Administrative Law Judges and the OSH Review Commission had consistently upheld such "continuing violations." The D. C. Circuit's decision has now rejected this long-standing practice and precedent by ruling that the six-month limitation period within which OSHA must issue citations runs only from the discrete act or omission of failing to record an individual injury or illness. The Court further explained that the obligation to maintain OSHA 300 Logs for the five-year period means only that an employer must "save" those Logs and that this obligation is separate and apart from the obligation to record an individual case. In essence, the Court has ruled that the "occurrence" of a violation, as stated in Section 9(c) of the OSH Act, happens if an employer fails to record a case as required within the required seven calendar days. Thus, if an employer receives information in June of 2011 that should have led to the recording of that case at that time, unless OSHA conducts an inspection and issues a citation within six months of the failure to record that June 2011 case, or any subsequent cases, the Agency would be time-barred from issuing such a citation.

This is obviously a very significant decision on its face, but even more so because it was issued by the D. C. Circuit. When an employer is issued a citation, if the employer decides to contest the citation, the case can be heard in a trial before an

administrative law judge. If the employer is dissatisfied with the judge's ruling, the employer can petition the OSH Review Commission in Washington, D.C., to review the judge's decision. If the Review Commission declines to review the case or if the Review Commission elects to review the case and issues a decision affirming the administrative law judge's ruling, that ruling can then be appealed to a federal Court of Appeals either in the circuit where the employer's cited business facility is located, where the employer's principal office is, *or in the Court of Appeals for the District of Columbia Circuit*. This means that for any recordkeeping citations, while other federal Courts of Appeal have not ruled yet on the issue, an employer's leverage with OSHA would be ultimately to appeal the case to the D. C. Circuit.

Where does this leave things? OSHA could seek to have the three-judge panel that decided the case re-consider its decision, the Agency could seek to have the full D. C. Circuit review the case, or OSHA could petition the United States Supreme Court to review the case. None of these options seems likely to lead to a reversal of the Court's decision OSHA may therefore be forced to undertake rulemaking procedures to amend its recordkeeping rules to try to more specifically create the obligation that employers have a continuing obligation throughout the five-year review period to maintain accurate logs. Rulemaking is typically a lengthy process.

Employers should not, however, assume that this ruling will similarly bar alleged violations of other OSHA standards. This decision is limited by the fact that "the occurrence" of failing to record an individual recordkeeping case is a discrete act under the terms of the applicable recordkeeping regulation. Although the same argument could be made under another OSHA Standard, it would depend on whether that Standard defined the employer's obligation as a comparable discrete act. An alleged violation of the Machine Guarding Standard would not lend itself to such a six-month argument if the required guarding remained off a machine at the time of OSHA's inspection. OSHA would have six months from the last day a machine was not properly guarded in which to issue a citation under those circumstances.

If you have any questions, please email us at: Bill Principe at bprincipe@constangy.com; David Smith at dsmith@constangy.com; Carla Gunnin at cgunnin@constangy.com; Pat Tyson at ptyson@constangy.com; Neil Wasser at nwasser@constangy.com; or Wright Mitchell at wmitchell@constangy.com. You may also reach any OSHA practice group attorney by calling 404-525-8622.