OSHA Advisory

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

MARCH 31, 2011

# Decision Drastically Expands OSHA's Power to Punish Recordkeeping Violation

BY JOSEPH P. CURTIN, WILLIAM M. HILL, AND PETER D. MCCARTHY

Employers hoping to "run out" the statute of limitations on Occupational Safety and Health Administration (OSHA) recordkeeping violations may now have a lot farther to run.

A recent Occupational Safety Health Review Commission (the Commission) decision effectively stretches the statute of limitations for OSHA recordkeeping violations from six months to five years or more, and may prevent employers from claiming that recordkeeping violations older than six months are "stale" or "untimely." *See Secretary of Labor v. AKM LLC d/b/a Volks Constructors*, OSHRC No. 06-1990, 2011 WL 896347 (OSHRC, March 11, 2011). The decision drastically increases employers' exposure to OSHA citations and fines, and raises troubling issues of due process for employers. In light of this ruling, employers should review and revise record-retention policies to account for OSHA's expanded enforcement reach.

In a 2–1 decision, the Commission affirmed OSHA's authority to punish employers for recordkeeping violations that occurred up to *five years* before the expiration of the six-month statute of limitations governing such recordkeeping errors, on the grounds that improper recordkeeping may constitute a *continuing violation* of OSHA's mandatory five-year record retention regulation.

The Commission upheld four OSHA citations against a contractor for (1) failing to record dozens of illnesses and injuries sustained between January 2002 and April 2006 in a log and on incident reports, and (2) neglecting to review and certify those records of employee illnesses and injuries. After conducting an investigation in May 2006, OSHA cited the contractor for the violations in November 2006—more than six months after the contractor's recordkeeping duties initially arose. Under longstanding OSHA regulations, "[n]o citation may be issued…after the expiration of *6 months following the occurrence* of any alleged violation." 29 CFR 1903.14(a), *emphasis added*. Not surprisingly, the contractor contested the citations arguing that its failures to record the various injuries were one-time mistakes, which occurred more than six months before the citations were issued, and therefore were time barred.

The Commission disagreed and upheld the citations. According to the Commission, the recordkeeping omissions involved more than the *initial failure* to record particular employees' injuries/illnesses at the time of their occurrence. The contractor had also committed *"subsequent violative conduct"* by failing to retain those records for the full five-year retention period—a breach of the contractor's duty under the OSHA regulations. The contractor's omissions were not merely independent or discrete violations. Instead, the majority held that the contractor's omissions were violations that *continued* for as long as the records were required to be retained; i.e., they *continued* for five years.

In a dissenting opinion, one commissioner explored the consequences of the majority's "continuing

violation" theory of recordkeeping violations: The "six-month limitations period could be extended for the five-year retention period applicable to logs of injuries and illnesses, plus [the automatic] one-week grace period following the occurrence of the triggering [injury or illness to record the event], plus six-months for the statute of limitations to run." According to the dissent, the "continuing violation" theory obliterated the otherwise-unambiguous statute of limitations by tacking on an unrelated limitations period.

The Commission's decision effectively expands the statute of limitations for recordkeeping violations ten times its stated length, from six months to five years or more. The ruling should prompt employers to review and update their recordkeeping policies to ensure that employee injuries and illnesses are properly, and timely, recorded when they occur. In addition, employers should ensure that their retention policies meet the regulatory requirements of the OSH Act by preserving documents for at least five years and six months.

For any questions regarding this advisory, please contact one of the authors or your Mintz Levin attorney.

* * *

***Click here to view Mintz Levin's Construction attorneys.***

***Click here to view Mintz Levin's Employment, Labor & Benefits attorneys.***