

Legal Sidebar

OSHA Proposed Rule Contradicts D.C. Circuit Decision

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On July 29, 2015, the Occupational Safety and Health Commission (OSHA) [proposed a rule](#) that contradicts a 2012 decision by the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) regarding when the OSH Act's statute of limitations properly begins to run following an employer's failure to record a workplace safety injury or illness. According to OSHA, the rule would clarify OSHA's existing interpretation of the statute of limitations in the context of a recordkeeping violation without imposing any new substantive obligations.

The Occupational Safety and Health Act (OSH Act) [authorizes](#) OSHA to issue regulations requiring employers to maintain records of workplace injuries and illnesses. Pursuant to this authority, OSHA [regulations](#) obligate employers to keep incident reports, yearly logs, and annual summaries of certain workplace injuries and illnesses. Separate OSHA regulations [require](#) employers to retain these records for five years. Employer failure to comply with these requirements can lead to citations and penalties. Under the OSH Act's [statute of limitations](#), OSHA cannot issue any citation for a violation of the act—including a recordkeeping violation—more than six months after the violation occurs.

In late 2006, OSHA issued a number of citations to an employer for failing to properly complete incident reports, logs, and annual summaries for employee injuries and illnesses that occurred between 2002 and early 2006, though OSHA did not cite the employer for failing to *retain* injury and illness records. The employer [appealed](#) these citations to the independent Occupational Safety and Health Review Commission (OSHRC), arguing that the citations were prohibited by the OSH Act's statute of limitations. More specifically, the employer argued that the citations were improper because they were not issued within six months of the employer's initial failure to create and update records after each injury and illness occurred. OSHA conversely argued, in accordance with its longstanding enforcement practices, that an employer's obligation to create and maintain appropriate injury and illness records is a continuing one that extends beyond the initial occurrence of the injury or illness and exists until the end of the five-year record retention period required by OSHA regulations. Thus, according to OSHA, the OSH Act's six-month statute of limitations does not begin to run until the end of the five-year record retention period. OSHRC sided with OSHA.

The employer successfully sought reversal of OSHRC's decision by the D.C. Circuit in [AKM LLC v. Secretary of Labor](#). Courts generally [defer](#) to agency interpretations of statutes that they administer—such as OSHA's interpretations of the OSH Act—in the absence of clear and unambiguous contrary statutory language, so long as the interpretations are reasonable. However, the D.C. Circuit observed that it was not required to defer to OSHA's determination that an employer's obligation to create and maintain appropriate injury and illnesses records last through the five-year record retention period because it found this determination both contrary to the OSH Act's clear language and unreasonable. More specifically, the D.C. Circuit observed that the OSH Act's statute of limitations plainly requires OSHA to issue citations for recordkeeping violations within six months of an employer's failure to record an injury or illness, and using OSHA record retention regulations to essentially increase the statute of limitations for recordkeeping violations is unreasonable.

OSHA's proposed rule would formalize its interpretation of the OSH Act's statute of limitations in the context of recordkeeping that the D.C. Circuit rejected in *AKM LLC*. That is, under the proposed rule, recordkeeping obligations would continue throughout the five-year record retention period contained in OSHA regulations. Therefore, the statute of limitations for violations of recordkeeping requirements would not expire until the end of the five-year period for record retention plus six months.

OSHA's proposed rule directly contradicts the D.C. Circuit's decision in *AKM LLC*. The D.C. Circuit's decision is not binding on OSHRC, nor is it binding on any other courts of appeals. Thus, even in the absence of OSHA's rule, OSHRC and other courts of appeals could have affirmed OSHA's interpretation of the OSH Act's statute of limitations in the context of recordkeeping. However, if the proposed rule were to become final, OSHA's formalization of this interpretation could increase the likelihood that OSHRC and other courts of appeals will do so. Conversely, however, if the rule were finalized, the D.C. Circuit or another court of appeals could find it contradictory to the language of the OSH Act and, therefore, invalidate it. Congress could resolve the disagreement between OSHA and the D.C. Circuit regarding when the statute of limitations properly begins to run by adding clarifying language to the OSH Act.

The [comment period](#) on OSHA's proposed rule ends on September 28, 2015.

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