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OSHA Recordkeeping Citations Must Issue Within Six Months

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By Marc A. Sugerman

The Occupational Safety and Health Administration (OSHA) must issue a citation for an employer's recordkeeping violation within six months after the date the employer failed to record an injury or illness, according to the U.S. Circuit Court of Appeals for the District of Columbia.

In 2006, OSHA conducted an inspection of AKM, LLC and discovered that AKM had committed 67 OSHA recordkeeping violations. OSHA issued a set of citations on Nov. 8, 2006, finding that AKM failed to record 102 injuries in its injury log, failed to conduct year-end summaries from 2002 until 2005, and incorrectly certified its year-end summary. The earliest recorded injury occurred on Jan. 11, 2002, and the latest occurred on April 22, 2006.

The Occupational Safety and Health Act provides that "no citation may be issued ... after the expiration of six months following the occurrence of any violation." On that basis, AKM moved to dismiss these citations as untimely, as the latest recorded injury on April 22, 2006, occurred more than six months prior to OSHA's Nov. 8, 2006 citations. An administrative law judge upheld the citations, as did the Occupational Safety and Health Review Commission.

OSHA argued that the act's five-year retention requirement permitted OSHA to issue citations for failing to record an injury up to six months after the expiration of the retention period, as opposed to six months after the employer's failure to record. Because an employer must record injuries within seven calendar days of an incident report, OSHA argued it could issue a citation five years, six months and seven days after the actual injury or incident. OSHA maintained that the failure to record an injury, and thereafter the failure to retain the nonexistent record, constituted an ongoing violation of the act throughout the five-year retention period.

AKM petitioned for review to the D.C. Circuit, which agreed with AKM that the citations were untimely and vacated the citations. OSHA may cite an employer for its failure to record an injury record beginning on the seventh calendar day after the injury occurred, but must issue the citation within the following six months. Once a record has been created, the employer must retain the record, and OSHA may issue a citation if the employer loses or destroys the record. However, OSHA may not cite an employer for failing to retain a record that it never created, and therefore the employer's initial failure does not constitute an ongoing violation.

The D.C. Circuit noted that the six-month limitation period is "triggered by the existence of a complete cause of action." The illegality of an employer's failure to record an injury is immediately apparent and constitutes a complete cause of action. "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." Thus, the appellate court found that OSHA must issue a citation within six months after an employer fails to record an injury or illness.

AKM, LLC v. Secretary of Labor, D.C. Cir., No. 11-1106 (Apr. 6, 2012).

Professional Pointer: It is essential that an employer develop and maintain an effective system for making, keeping and maintaining records of workplace injuries and illnesses.

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