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OSHA Docket Office
Docket No. OSHA-2015-0006
RIN No. 1218-AC84
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Comments on the OSHA notice of proposed rule regarding "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness."

The Association of Union Constructors (TAUC) appreciates the opportunity to provide comments in response to Occupational Health and Safety Administration's (OSHA) proposed rule seeking to clarify an employer's record retention obligations.

TAUC is a national trade association representing more than 2,000 contractor firms that utilize union labor for their clients' industrial construction and maintenance projects. One of TAUC's primary objectives is to enhance labor-management cooperation and workplace safety and health. We participate in numerous training activities and keep our members up to date on the latest safety regulations and initiatives at both the state and federal level.

OSHA's proposed rule, which intends to clarify its recordkeeping regulations in the wake of the decision of the U.S. Court of Appeals for the DC Circuit in *AKM LLC, dba Volks Constructors v. Secretary of Labor*, No. 11-1106, April 6, 2012 (*Volks*) is both unnecessary and overly burdensome. While we recognize the importance of complete and accurate injury and illness record keeping, extending the current record retention statute of limitation — as called for in the proposed rule –- is nothing more than a duplicative paperwork exercise that will expose contractors to unnecessary citations and fines.

Under OSHA's current regulations, employers must record occupation-related injuries within seven days of learning of the occurrence. At the end of each calendar year, an employer must prepare a summary of cases. Employers must also retain these records for a period of five years following the end of the year for which they apply. Congress gave OSHA the authority to issue citations for violations of regulations adopted under the Occupational Health and Safety (OSH) Act. However, the Act also creates a statute of limitations of six months with regard to record-making and -keeping regulations that states. (29 U.S.C. § 658(c)).

In *Volks*, OSHA argued that the violation of record-retention regulations constituted "continuing violations" that prevented the statute of limitations from expiring until the end of the five year document retention period. As such, citations could be issued beyond the six months following the violation throughout the five year retention

period. The court dismissed this argument, ruling that a record-making violation does not in fact constitute a "continuing violation" since record-making requirements set forth in the OSH Act do not allow OSHA to issue citations following six months after the violation.

Despite the fact that the Court rejected OSHA's arguments, the agency is now trying to impose its will through regulation. Where § 1904.29 of the original recordkeeping regulation (Federal Register, Volume 66, Number 13, January 19, 2001) states that employers must record occupational injuries or illnesses within seven days of learning of the instance, OSHA is now proposing in this rule that "a failure to meet this deadline does not extinguish your continuing obligation to make a record…throughout the entire record retention period…" Moreover, the court believed OSHA's position extended beyond the authority granted to the administration by Congress. The court stated, "We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary [of Labor] to ignore it." OSHA's proposed revision ignores both the intent of Congress and the decision of Court in Volks, and will unnecessarily harm employers and provide no discernible benefits to employees.

TAUC appreciates the necessity and importance of an employer's duty to keep accurate records of occupational injuries and illnesses. Our member firms have numerous incentives to maintain strict records, including: improving the overall health and safety of their workers; preventing future instance; ensuring that employers and workers adhere to safe work practices; and allowing employers to share and learn best practices across the industry. In addition, OSHA's proposal to enter every recordable case on an employer's injury log, and updating that log to include cases not previously recorded could lead to increased insurance premiums and difficulty obtaining insurance coverage with preferred carriers. Ultimately, the time that would be required to comply with this rule takes valuable time away from employers to enhance the safety of their workplaces and job sites on a more proactive and practical level.

TAUC contractors hire from craft labor unions with legitimate DOL-recognized apprenticeship and journeyperson training programs. In addition to the money spent on these programs, employers continuously invest in site-specific and hazard-specific training and equipment to ensure employee protection. These are skilled professionals who follow a code of excellence for industrial maintenance and construction work. TAUC contractors work in a tripartite relationship with Building Trade Unions and their owner/customers. This relationship extends into safety – not only to protect life and limb, but the public and environment. While TAUC appreciates the agency's intent with recordkeeping to address safety and health issues through the review of records, the rule as proposed increases the potential for employers to be cited for paperwork violations, even if no alleged violations are identified in the field.

The proposed rule also fails to recognize the unique challenges presented by the structure and nature of the construction and maintenance industry. Our members' firms work for numerous customers and owners on a project-by-project basis. The project-based nature of the construction industry means that TAUC's union construction contractors do not have a permanent, in-house workforce. Once the job is finished, the contractor may not work for that customer or in that area for an extended period of time. As such, they often lack contact with former workers in those geographic areas, which will complicate the employer's ability to comply with the rule as proposed. Again, adding time and removing valuable resources that could be dedicated to more proactive safety and health initiatives.

This proposed rule, which ignores both the decision of the court and the authority granted to OSHA by Congress through the OSH Act, only serves as a means to increase the collection of citations and fines. OSHA continues to deny the existence of a six month statute of limitations on record-retention despite having already been told

otherwise by the courts. The proposed rule is both unnecessary and outside of OSHA's authority. TAUC strongly encourages OSHA to withdraw this proposed rule.

Respectfully submitted,

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The Association of Union Constructors