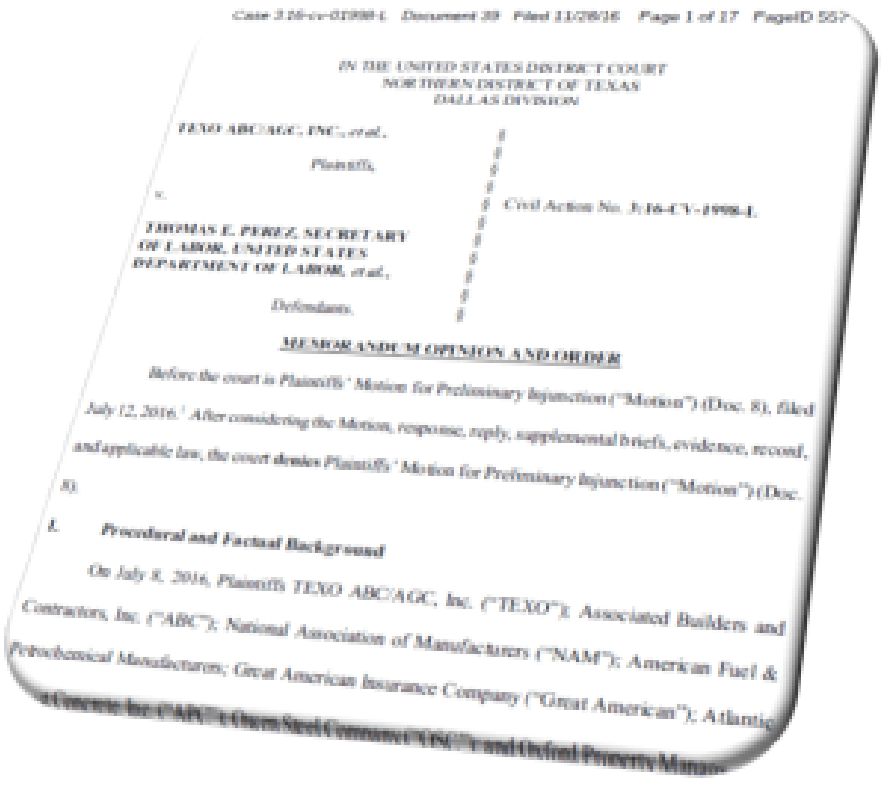
NOVEMBER 30, 2016 | OSHA RULEMAKINGS & STANDARDS

# Court Denies Motion to Stay OSHA's Enforcement of Anti-Retaliation Elements of E-Recordkeeping Rule

By Eric J. Conn

***By Law the Anti-Retaliation Provisions of OSHA's New Electronic Recordkeeping Rule Become Effective December 1st — Tomorrow!***

On November 28, 2016, the federal district court Judge in the Northern District of Texas hearing Industry's legal challenge to the anti-retaliation portions of OSHA's new electronic recordkeeping rule (i.e., limits on injury reporting requirements, post-incident drug testing, and safety incentive programs), issued an Order denying Industry's motion for a preliminary injunction that would have prohibited OSHA from enforcing these controversial new provisions. ***The Court's Order clears the way for the new provisions to become effective and enforceable as of December 1, 2016.***



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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXO ABC/AGC, INC., et al.,

Plaintiffs,

v.

Civil Action No. 3:16-CV-1998-L

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the court is Plaintiffs' Motion for Preliminary Injunction ("Motion") (Doc. 8), filed July 12, 2016.[1] After considering the Motion, response, reply, supplemental briefs, evidence, record, and applicable law, the court denies Plaintiffs' Motion for Preliminary Injunction ("Motion") (Doc. 8).

I. Procedural and Factual Background

On July 8, 2016, Plaintiffs TEXO ABC/AGC, Inc. ("TEXO"); Associated Builders and Contractors, Inc. ("ABC"); National Association of Manufacturers ("NAM"); American Fuel & Petrochemical Manufacturers; Great American Insurance Company ("Great American"); Atlantic

Accordingly, it is not only prudent but perhaps imperative that employers immediately evaluate their safety

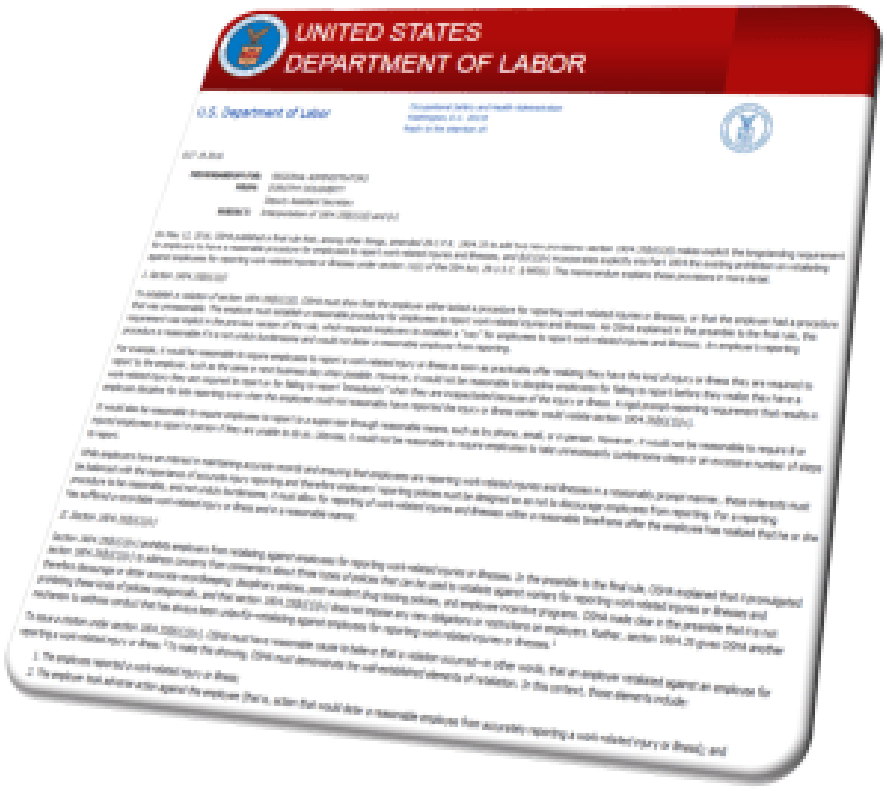
incentive programs; drug testing programs; management bonus compensation schemes; and injury reporting policies to determine whether they comport with the new rule.

The rule adds new language to OSHA's injury and illness recordkeeping regulation at 29 C.F.R. 1904.35(b)(1):

***"reasonable procedure for employees to report work related injuries and illnesses promptly and accurately. . . . [A reporting procedure] is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness."***

Because this language is so broad and vague, it is impossible to understand from the face of the rule what policies and conduct are required or prohibited. OSHA acknowledged that, as well, and even defended against Industry's Preliminary Injunction motion on the grounds that there was no way Industry can show irreparable harm from the new rule because there was no way for employers to know what the rule actually prohibits and requires.

However, recently, on October 19, 2016, OSHA issued a Guidance Memorandum that puts a little more meat on the bones of the regulation, so to speak. Here is our article from earlier this month that details OSHA's interpretation of these new provisions from that Guidance Memo and the Preamble to the Final Rule.




For those concerned that the Court's ruling telegraphs the ultimate outcome of Industry's legal challenge, and effort to permanently stop enforcement of these provisions, do not despair. A review of Judge Lindsay's 17-page Opinion accompanying his decision makes clear that the Court's denial of the preliminary injunction motion does not reflect on the Judge's overall view of the merits or strength of Industry's underlying legal challenge to the Rule.

In order for the Industry groups to prevail on this motion for a Preliminary Injunction, they needed to establish:

- There is a substantial likelihood that the party seeking the injunction will prevail on the merits of the underlying action;
- There is a substantial threat that irreparable harm will result if the injunction is not granted;
- The threatened injury to the party seeking the injunction outweighs the threatened harm to the defendant; and
- The granting of the preliminary injunction will not disserve the public interest.

In other words, Industry needed to establish BOTH that the new Rule was likely to be found unlawful, AND that allowing enforcement of these provisions in the meantime would cause irreparable harm to Industry. Judge Lindsay seemed to go out of his way to explain that he denied the preliminary injunction ONLY on the grounds that Industry did not meet the high burden of proof necessary to establish irreparable harm.

**"Plaintiffs have failed to carry their burden in demonstrating that there is a substantial threat that irreparable harm will result or that the public interest will not be disserved if a preliminary injunction is granted to enjoin implementation of the Rule pending resolution of this action. . . . *That the court has denied injunctive relief requested by Plaintiffs [industry] is not a comment or indication as to whether Defendants [OSHA] will ultimately prevail on the merits. This determination is left for another day.*"**

Judge Lindsay's Opinion holds that the plaintiffs failed to meet its burden to show that denial of the injunction would result in a substantial threat of irreparable harm and, further, that granting the preliminary injunction would not disserve the public interest. Essentially, the Court found that Plaintiffs' proof of irreparable harm was simply too speculative and conjectural to meet the burden of proof necessary to grant such extraordinary relief, characterizing plaintiffs' proof as "conclusory statements of unsupported beliefs." Judge Lindsay concluded that:

***"[p]otential future injury based on unfounded fear and speculation [of the sort he ascribes to industry's affidavits supporting its injunction request] is insufficient to establish a substantial threat that irreparable harm will occur if a preliminary injunction is not granted."***

Additionally, the Court found that Plaintiffs' proof that granting injunctive relief will not disserve the public interest fell short as well, for the same reasons it found insufficient proof of irreparable harm. In sum, Judge Lindsay felt that Industry simply had not shown that revision or even elimination of their current safety incentive and drug testing programs would actually result in more workplace injuries. Thus, an injunction to insulate these programs would not be necessary to serve the public interest of protecting employees from harm for the period that the Court entertains the full legal challenge to the Rule.

Significantly, however, the Court steered clear of any suggestion that it has determined that the plaintiffs do not have a sufficient case to demonstrate the likelihood of success on the merits of its challenge to the Agency's authority to promulgate these new anti-retaliation provisions. Thus, any attempt to read the tea leaves is premature just based on this denial of the preliminary injunction. As Judge Lindsay stated, this determination will need to await another day. Unfortunately, that day may be many months in the offing, and in the interim, OSHA is free to begin enforcing its new Anti-Retaliation Recordkeeping Rule.

The denial of a preliminary injunction is immediately appealable if it is related to the substantive issues of the litigation, which this injunction certainly is. Regardless, even with an emergency appeal, the rule will technically go into effect well before any decision by the Fifth Circuit court of appeals is possible. Also, because of the high standard to overturn a district court's Judge's on issues like this, and Judge Lindsay's very thorough opinion, a successful appeal on the preliminary injunction seems unlikely. The better route to undoing this rule through the courts, is to move the overall legal challenge to a hearing on the merits as soon as possible.

A successful outcome of Industry's legal challenge may not be the only obstacle that stops OSHA from enforcing this controversial new rule over the Long Term. It remains to be seen whether a Trump Administration will support the Rule if it agrees the Rule disruptive of current industry practices. Once in place, the new Administration could consider a range of options, from formally rescinding the rule through rulemaking, to issue new formal interpretations that cut the legs from the Rule, to directing Agency enforcement personnel to not prioritize enforcement of the new rule. Similarly, either on its own or through efforts of Congress, funds earmarked for enforcement of this rule could be denied or reallocated, effectively shelving the rule even if it technically remains on the books.

A Trump Administration pull-back of the Rule and/or an ultimate successful outcome of Industry's challenge, however, are at best months, and more likely years away. In the meantime, as of tomorrow, OSHA has authority to commence enforcement of the rule. We suspect that the current leadership team at OSHA will have a high interest in using the waning days of the Obama Administration to aggressively enforce this new rule to incentivize as many employers as possible to make changes to their safety incentive, drug testing, late reporting and other implicated programs. Accordingly, to ensure against legal exposure for regulatory violations of OSHA's new rule, companies need to carefully analyze their existing programs and policies to determine whether modifications and revisions are necessary to become compliant with the new regulation.

For more background on the new Recordkeeping Rule (both the electronic record submission and the anti-retaliation elements), check out the recording of this webinar by attorneys in Conn Maciel Carey's national OSHA practice.

[youtube https://www.youtube.com/watch?v=smCeB9Sv1XU&w=560&h=315]