

## Lawlessness Quashed, Part II: President and Congress Stop OSHA's Attempt to Avoid the Volks Decision

Article By:

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On Monday, April 3, 2017, President Trump signed a Congressional Review Act resolution, passed by the House on March 1 and by the Senate on March 22, that disapproves of the **Occupational Safety and Health Administration's (OSHA)** attempt, by mere amendment of its regulations, to effectively extend the statute of limitations for recordkeeping violations from six months to five and a half years.

As I explained in detail in a [previous blog post](#), OSHA thought that amending its regulations would permit it to avoid the decision of the United States Court of Appeals for the District of Columbia Circuit in *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012), a case in which I represented the employer. That decision held that the six-month statute of limitations in the Occupational Safety and Health Act (OSH Act) ran from the failure to record an injury and rejected OSHA's argument that the violation continued until corrected. The amendments to the regulations were published at 81 Fed. Reg. 91792 (Dec. 19, 2016).

OSHA thought that it could avoid the court's decision by amending its regulations to state that the duty to have correct logs continued throughout the five-year period that the logs must be retained. It did so even though the D.C. Circuit, anticipating this move, stated that it would be "madness" for OSHA to attempt to avoid the court's ruling by amending its regulations. "We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it."

OSHA's attempt also rested on a fiction—that the D.C. Circuit's ruling had been based on a misunderstanding of OSHA's regulations, when it instead rested on the wording of a statute, which OSHA could not change by administrative fiat. OSHA's preamble to the amendments stated that it was instead following a minority opinion in the *Volks* case, namely the concurring opinion of Judge Garland, which rested on the wording of OSHA's regulations.

OSHA's attempt was widely seen as a lawless effort to avoid what the D.C. Circuit called "clear" statutory language. This impression was reinforced when on December 29, the Fifth Circuit endorsed the reasoning of the *Volks* decision in *Delek Ref., Ltd. v. OSHRC*, 845 F.3d 170 (5th Cir. 2016). For example, when a resolution of disapproval of the amended regulations was introduced in the House of Representatives, its sponsor called OSHA's move "an outright power grab" and "an abuse of

executive power.”

## The Future

The immediate effect of the President’s signature on Congress’s joint resolution of disapproval is that OSHA’s amendment of its recordkeeping regulations “shall have no force or effect.” A longer-range effect is that, according to the Congressional Review Act, the regulations “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued.” To get around this, Congress would have to pass legislation authorizing a new rule or would have to amend the statute of limitations in the OSH Act, both of which are unlikely.

The resolution of disapproval does not, technically, bar OSHA from attempting to relitigate the issue in other circuits under the regulations as they stood when the *Volks* decision was issued. As I have previously observed, however, it is unrealistic for OSHA to think that another court would disagree with the *Volks* decision. In sum, the decision on the length of the limitations period under the OSH Act for recordkeeping violations will continue to rest with Congress and the President, where it properly rested all along.

Part 1- [Quashing Lawlessness: Congress Votes on OSHA’s Attempt to Avoid the Volks Decision](#)

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