



February 27, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable John Cornyn
Majority Whip
United States Senate
Washington, D.C. 20510

The Honorable Lamar Alexander
Chairman
Senate Committee on Health, Education, Labor and Pensions
Washington, D.C. 20510

The Honorable Johnny Isakson
Chairman
Senate Subcommittee on Employment and Workplace Safety,
Committee on Health, Education, Labor and Pensions
Washington, D.C. 20510

Dear Majority Leader McConnell, Majority Whip Cornyn, Chairmen Alexander and Isakson:

The undersigned groups strongly urge you to introduce and move a Congressional Review Act (CRA) joint resolution of disapproval to invalidate the Obama Administration's OSHA regulation overturning the decision in *Volks*¹ regarding the statute of limitations for recordkeeping violations.

At its core, the *Volks Rule*² is an extreme abuse of authority by a federal agency that will subject millions of American businesses to citations for paperwork violations, while doing nothing to improve worker health and safety. Finalized on December 19, 2016, the rule attempts to extend to five years the explicit six month statute of limitations on recordkeeping violations in the Occupational Safety and Health (OSH) Act of 1970.³ This regulation simultaneously represents one of the most egregious end runs around Congress' power to write the laws and a clear challenge to the judicial branch's authority to prevent an agency from exceeding its authority to interpret the law.

In 2012, citing the unambiguous language in the OSH Act, the U.S. Court of Appeals for the District of Columbia held that OSHA could not sustain citations against an employer for alleged recordkeeping violations that occurred more than six months before the issuance of the

¹ *AKM LLC v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012).

² *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness*, Occupational Safety and Health Administration, 81 Fed. Reg. 91,792 (Dec. 19, 2016).

³ 29 U.S.C. 658 (c).

citation because, as the employer asserted, they were outside the six month statute of limitations set forth in the OSH Act. The court was unequivocal in its rebuke of OSHA. Judge Janice Rogers Brown expressed particular concern on the issue of the agency's overstepping its authority: "we were rightly troubled by the notion of being asked by an agency to expand that agency's enforcement authority when Congress had evidently not seen fit to do so." Judge Merrick Garland, in his concurrence, plainly rejected OSHA's rationale for issuing the fines, "the Secretary's contention -- that the regulations that *Volks* was cited for violating support a 'continuing violation' theory -- is not reasonable." The *Volks* decision has since been endorsed by the Fifth Circuit in the *Delek*⁴ decision, issued in December 2016, where the court found "its reasoning persuasive."

In response to the Court of Appeals ruling, OSHA promulgated this regulation specifically to negate the *Volks* case ruling and extend liability for paperwork violations beyond the six month window permitted under the Act. OSHA issued the final rule in the waning days of President Obama's Administration with an effective date of January 19, 2017. Although the regulation was issued in December, it was not submitted to Congress until January 4, meaning that a Senate resolution must be introduced by March 4 to take advantage of the favorable Senate procedure specified in the Congressional Review Act.

We urge you to help put a stop to OSHA's abuse of its authority and support swift passage of a joint resolution of disapproval for this burdensome, unlawful rule. Because the final rule directly contradicts both clear statutory language and two U.S. Courts of Appeals rulings, it must not be allowed to stand.

Thank you for your consideration of this request and for your continued efforts to rein in agency overreach and reduce the regulatory burden on America's job creators.

Sincerely,

Air Conditioning Contractors of America
American Bakers Association
American Coke and Coal Chemicals Institute
American Composites Manufacturers Association
American Farm Bureau Federation
American Feed Industry Association
American Foundry Society
American Fuel and Petrochemical Manufacturers
American Health Care Association
American Iron and Steel Institute
American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association, Inc.
American Supply Association

⁴ *Delek Refining, Ltd. V. Occupational Safety and Health Review Comm'n*, 845 F.3d 170 (5th Cir. Dec. 29, 2016).

American Trucking Associations
Asphalt Roofing Manufacturers Association
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
Copper & Brass Fabricators Council, Inc.
Corn Refiners Association
Distribution Contractors Association
Flexible Packaging Association
Global Cold Chain Alliance
Independent Electrical Contractors
Industrial Minerals Association – North America
Institute of Makers of Explosives
International Dairy Foods Association
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
IPC-Association Connecting Electronics Industries
Leading Builders of America
Mason Contractors Association of America
Mechanical Contractors Association of America
Mike Ray
Motor & Equipment Manufacturers Association
National Association for Surface Finishing
National Association of Home Builders
National Association of Manufacturers
National Association of Professional Employer Organizations
National Association of the Remodeling Industry
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Center for Assisted Living
National Chicken Council
National Cotton Ginners' Association
National Demolition Association
National Electrical Contractors Association
National Federation of Independent Business
National Grain and Feed Association
National Lumber and Building Material Dealers Association
National Oilseed Processors Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National School Transportation Association
National Tooling and Machining Association
National Turkey Federation

National Utility Contractors Association
Non-Ferrous Founders' Society
North American Die Casting Association
North American Meat Institute
Plastics Industry Association (PLASTICS)
Power and Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Industry Leaders Association
Sheet Metal and Air Conditioning Contractors National Association
Shipbuilders Council of America
Southeastern Cotton Ginners Association, Inc.
Texas Cotton Ginners' Association
The Association of Union Constructors (TAUC)
Thomas W. Lawrence, Jr. -- Safety and Compliance Management
Tile Roofing Institute
Tree Care Industry Association
TRSA – The Linen, Uniform and Facility Services Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association