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

TEXO ABC/AGC, INC., ASSOCIATED BUILDERS AND CONTRACTORS, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, GREAT AMERICAN INSURANCE COMPANY, ATLANTIC PRECAST CONCRETE, INC., OWEN STEEL COMPANY, and OXFORD PROPERTY MANAGEMENT LLC, **PLAINTIFFS,** **v.** **THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, et al.,** **DEFENDANTS.**	**CIVIL ACTION NO. 3:16-cv-1998**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE AND HEARING

Steven R. McCown
TX Bar 13466500
Maurice Baskin*
DC Bar 248898
Thomas Benjamin Huggett*
PA Bar 80538
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201-2931
(214) 880-8100
(214) 880-0181 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

* *pro hac vice* motion pending

Of Counsel:

Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000
Counsel for the National
Association of Manufacturers

Richard Moskowitz
General Counsel
American Fuel & Petrochemical
Manufacturers
1667 K Street NW, Suite 700
Washington, DC 20006
202.552.8474

Lawrence P. Halprin
Douglas Behr
Keller and Heckman, LLP
1001 G St., N.W.
Suite 500 WestWashington, D.C. 20001
202-434-4177

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I. INTRODUCTION

Plaintiffs have brought this action seeking to vacate portions of the final rule issued by the United States Department of Labor's (DOL's) Occupational Safety and Health Administration ("OSHA" or "the agency") titled "Improve Tracking of Workplace Injuries and Illnesses," 81 FED. REG. 29,624 (May 12, 2016), as revised at 81 FED. REG. 31,854 (May 20, 2016), hereinafter referred to as "the New Rule," (to be codified at 29 C.F.R. Part 1904). Plaintiffs' Emergency Motion for Preliminary Injunction and Request for Expedited Briefing Schedule and Hearing seeks to enjoin specific unlawful provisions of the New Rule, which will otherwise take effect on August 10, 2016, causing irreparable harm to Plaintiffs' members and insureds, and many thousands of employers across the country. The specific provisions at issue in this emergency motion are Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule,[1] in which OSHA purports to regulate and for the first time prohibit "incident-based" employer safety incentive programs and routine mandatory post-incident drug testing programs (collectively "the Safety Programs").[2]

The Safety Programs at issue demonstrably help employers to promote workplace safety, which is supposed to be OSHA's primary mission. Instead, the New Rule declares incident-based safety incentive programs and post-accident drug testing programs to be unlawfully "retaliatory," even though these programs make workplaces *safer*, and even though

[1] The foregoing Subparagraphs are the only provisions of the New Rule that are scheduled to take effect on August 10. Nothing in Plaintiffs' Complaint or this Emergency Motion constitutes acceptance or approval of the additional electronic reporting and recordkeeping provisions of the New Rule that do not take effect until 2017. Potential challenges to other aspects of the New Rule remain under active consideration.

[2] As used throughout this Emergency Motion and Plaintiffs' Complaint, an "incident-based safety incentive program" is one which offers benefits to employees that are conditioned on the absence of incidents of workplace injury during a specified period of time. A "routine mandatory post-incident drug testing program" is one in which employees are routinely tested for drugs or alcohol after any workplace accident, regardless of whether drug use is suspected of being the cause of the accident, and regardless of whether the test measures actual impairment at the time of the accident..

there is no scientific evidence that the Safety Programs cause any material reduction in reporting of workplace injuries or illnesses.

As further explained below, the New Rule conflicts with numerous provisions of the Occupational Safety and Health Act of 1970 (the "OSH Act" or the "Act"). First, it radically departs from Section 11(c) of the OSH Act, 29 U.S.C. § 660(c) (hereinafter Section 11(c)), in which Congress established the exclusive mechanism for addressing claims of retaliation by employers against employees complaining of violations of the Act. The New Rule for the first time purports to allow OSHA, without any Congressional delegation of authority, to issue citations to employers for allegedly retaliating against employees for reporting work-related injuries and illnesses, even if no employee has filed a Section 11(c) complaint.

OSHA also failed to comply with Section 8(c)(1) of the OSH Act because the agency did not demonstrate that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule are reasonably necessary or appropriate for ensuring accurate injury and illness reporting, for enforcement of the OSH Act, or for developing information on the causes and prevention of occupational accidents and illnesses. OSHA also failed to show that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule do not, directly or indirectly, impose an unreasonable burden on employers as required by Section 8(d) of the OSH Act. In addition, OSHA did not provide interested parties with legally adequate notice of its intent to adopt a rule that would regulate and ultimately ban incident-based safety incentive programs and post-incident testing programs and therefore failed to comply with Section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Finally, the New Rule violates Section 4(b)(4) of the OSH Act by imposing regulatory requirements that affect workers' compensation laws in many states that either require or encourage post-accident drug testing programs.

In addition to all of the foregoing violations of the Act itself, the anti-retaliatory provisions of the New Rule are also arbitrary and capricious. The Rule elevates form over substance, or more specifically, elevates the accuracy of recording workplace injuries over what should be the more important goal of *reducing the number of such injuries*. In banning as "retaliatory" virtually all incident-based safety incentive programs and routine, mandatory post-accident drug testing programs, *Id*. at 29673, OSHA failed to consider substantial evidence in the administrative record establishing that such safety programs reduce the number of workplace injuries and even save lives. OSHA also failed to consider evidence that these safety programs may actually enhance the accuracy of reporting and certainly do not adversely impact such reporting. OSHA should be *encouraging* these programs, not prohibiting them.

Contrary to the recent holding of the Supreme Court in *Encino Motorcars v. Navarro*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (June 20, 2016), OSHA's New Rule is also arbitrary and capricious because it provides no recognition of or explanation for the agency's departure from long established policy permitting incident-based safety incentive programs and routine post-accident drug testing programs. In particular, OSHA has given no cognizance to the fact that the business community has relied on the previously established policy permitting such programs, which are now ingrained in the safety culture of many thousands of businesses.

The New Rule irreparably harms the Plaintiffs' employer members and insureds by making their workplaces less safe, increasing the likelihood of workplace injuries and fatalities, and subjecting the businesses to increased inspections, citations and penalties, which are not supported by the plain text of the OSH Act. If OSHA's rule is not struck down, these plaintiffs will have to make a "Hobson's choice" between eliminating or drastically restricting highly effective incident-based safety programs and/or drug testing programs, thereby increasing the

number of employee injuries and even fatalities in the workplace; or else risking exposure to increased OSHA citations, inspections and penalties if the safety programs are not removed. *See* Declarations attached to this Emergency Motion.

For all of the above reasons, further discussed below, Plaintiffs are entitled to preliminary injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure to prevent the New Rule from going into effect on its scheduled effective date of August 10, 2016. Plaintiffs are likely to succeed on the merits of their claims; Plaintiffs will be irreparably harmed in the absence of an injunction; the balance of harms strongly favors the Plaintiffs; and an injunction that preserves the status quo of the past four and a half decades is in the public interest pending a ruling on the merits of Plaintiffs' Complaint.

II. FACTUAL BACKGROUND FOR THIS EMERGENCY MOTION

A. OSHA's Limited Statutory Authority To Promulgate Injury and Illness Recordkeeping Regulations, But Not The Anti-Retaliation Provisions Of The New Rule.

The main goal of the OSH Act is to eliminate or minimize the frequency and severity of workplace injuries, illnesses and deaths. Towards that end, Congress enacted Sections 8 and 24 of the Act, 29 U.S.C. §§ 657 and 673, authorizing OSHA to adopt injury and illness recordkeeping requirements, as follows:

> [Section 8(c)(1):] Each employer shall make, keep and preserve, and make available to the [OSHA] … such records regarding his activities relating to this Act as [OSHA] … may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses . . .
>
> [Section 8(c)(2):] [OSHA shall] prescribe regulations requiring employers to maintain accurate records of and to make periodic reports on, work-related deaths, injuries and illnesses …

> [Section 8(d):] Any information obtained by the [OSHA] under this Act shall be obtained with a minimum burden upon employers, especially small employers.
>
> [Section 24(a):] [OSHA] … shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics… and … compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses . . .”

Section 11(c) of the OSH Act further prohibits any employer from discharging, retaliating or discriminating against any employee because the worker has exercised rights under the Act.

Section 11(c) states:

> (c) (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.
>
> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
>
> (3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

29 U.S.C. § 660(c). This provision establishes an exclusive process for handling discrimination and retaliation complaints through lawsuits in the United States District Courts. Nothing in this

provision gives OSHA authority to "create an additional enforcement tool" or to issue citations to employers for allegedly retaliating against employees for reporting work-related injuries and illnesses.

Moreover, the legislative history is clear that Congress contemplated and rejected making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of an OSHA citation. *See* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971). Specifically, House Bill H.R. 19200 (Sept. 15, 1970), 91st Congress, 2nd Session, proposed language under Section 17 – Penalties that stated:

> (g) Any person who discharges or in any other manner discriminates against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, shall be assessed a civil penalty by the Commission of up to $10,000. Such a person may also be subject to a fine of not more than $10,000 or imprisonment of a period of not to exceed ten years or both.

The foregoing House bill was rejected in the final Conference Report, which stated:

> The Senate bill[3] provided for administrative action to obtain relief for an employee discriminated against for asserting rights under this Act, including reinstatement with back pay. The House bill[4] contained no provision for obtaining such administrative relief; rather it provided civil and criminal penalties for employers who discriminate against employees in such cases. With respect to the first matter, the House receded with an amendment making specific jurisdiction of the district courts for proceedings brought by the Secretary to restrain violations and other appropriate relief. **With respect to the second matter dealing with civil and criminal penalties for employers, the House receded.** [emphasis added].

[3] See Section 10(f) of S. 2193, *See Legislative History of the Occupational Safety and Health Act of 1970 (S.* 2193*, P.L. 91-596)*, U.S. Government Printing Office, pg. 180 (1971).
[4] Section 15(d)(6) of H.R. 19200, Legislative History at 763; *see also* Section 15(f) of H.R. 16785.

Conference Report No. 91-1765 (December 16, 1970), 91st Cong., 2d Sess. (1970), *reprinted in* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1192. As acknowledged and confirmed in the leading treatise on workplace safety:

> The Senate bill authorized administrative action to obtain relief for an employee discriminated against for asserting rights under the statute, including reinstatement with back pay. The House measure, however, called for criminal and civil penalties against employers who discriminated against employees in such circumstances. The conferees compromised; requiring that the Secretary seek relief (reinstatement with back pay) but that this be done in the district courts, not through administrative process.[footnote omitted.][5]

In other words, Congress explicitly considered and withheld from OSHA the authority to initiate enforcement actions or issue citations for unlawful discriminatory conduct or retaliation prohibited by Section 11(c). Instead Congress set out a full process whereby employees could file complaints of such discriminatory action and employers could have an opportunity for judicial review in a U.S. District Court. 29 U.S.C. § 660(c).[6]

B. OSHA's Previous Implementation of the OSH Act Recordkeeping and Anti-Retaliation Provisions

OSHA's current (previous) Injury and Illness Recordkeeping and Reporting Rule, codified in 29 C.F.R. Part 1904, established broadly applicable requirements for the identification, recording, and reporting, to OSHA and the Bureau of Labor Statistics ("BLS"), of all work-related injuries and illnesses other than minor conditions that do not require more than first aid treatment. OSHA has explained the purpose of the current recordkeeping rule as follows:

> Injury and illness statistics are used by OSHA … to help direct its programs and measure its own performance. Inspectors also use

[5] *Occupational Safety and Health Law*, ABA Section of Labor and Employment Law, Randy S. Rabinowitz, Editor-in-Chief (2nd ed. 2002).

[6] Section 11(c) of the Act also established a 30-day time limitation for filing complaints under that provision. Nowhere did Congress authorize OSHA to extend the limitations period, either through its citation authority or otherwise.

> the data during inspections to help direct their efforts to the hazards that are hurting workers. The records are also used by employers and employees to implement safety and health programs at individual workplaces. Analysis of the data is a widely recognized method for discovering workplace safety and health problems and for tracking progress in solving those problems. The records provide the base data for the BLS Annual Survey of Occupational Injuries and Illnesses, the Nation's primary source of occupational injury and illness data.

See 29 C.F.R. 1904.0 Purpose Frequently Asked Questions, Question 0-1, https://www.osha.gov/recordkeeping/entryfaq.html. Given the limite purposes of such recordkeeping, the impact of under-reporting is negligible and there are available safeguards against under-reporting, which OSHA chose to ignore in the presently challenged rulemaking.

Following enactment of the OSH Act as set forth above, OSHA went through notice and comment rulemaking to establish how retaliation complaints under Section 11(c) would be handled. 38 Fed. Reg. 2,681 (Jan. 29, 1973) (codified at 29 C.F.R. Part 1977). Those regulations reiterated the basic requirements for the filing of a complaint by an employee and, where meritorious, the filing of a lawsuit in United States District Court. 29 C.F.R. § 1977.3. In the more than forty-five (45) years since, OSHA has never attempted to issue a civil citation or penalty for a violation of this provision, a clear recognition that the agency did not (and does not) have any such authority.[7]

C. OSHA's New Rule on Recordkeeping and Retaliation

On November 8, 2013, OSHA published a Notice of Proposed Rulemaking ("NPRM") titled "Improve Tracking of Workplace Injuries and Illnesses," 78 FED. REG. 67,254 (Nov. 8, 2013)("NPRM"). The NPRM proposed modifications to OSHA's Recordkeeping Rule that

[7] In a March 12, 2012, directive to Regional Administrators, the Director of Enforcement Programs stated that injury reporting and safety incentive programs should be carefully evaluated when a Section 11(c) discrimination complaint is filed, but never suggested that any enforcement citation should be issued. *Memorandum on Employer Safety Incentive and Disincentive Policies and Practices,* Dep. Asst. Secretary Richard E. Fairfax, (Mar. 12, 2012), https://www.osha.gov/as/opa/whistleblowermemo.html.

would require approximately 400,000 employers to electronically submit injury and illness recordkeeping data to OSHA. There was no mention in the NPRM of any concerns regarding employer policies or programs that might discourage employees from reporting injuries and illnesses.

After receipt of public comments on the NPRM,[8] however, OSHA issued a Supplemental Notice of Proposed Rulemaking (Supplemental NPRM), Improve Tracking of Workplace Injuries and Illnesses (79 FED. REG. 47,605, August 14, 2014). In this unusual procedure not specifically identified in the APA, OSHA purported to identify two basic categories of employer policies or procedures that it asserted presented a "concern" on the agency's part with regard to potential interference with recordkeeping: (1) "unreasonable requirements for reporting injuries and illnesses"; and (2) "retaliating against employees who report injuries and illnesses," which OSHA clarified to mean situations where "an employer disciplines or takes [other] adverse action against an employee for reporting an injury or illness." 79 FED. REG. at 47605. OSHA then concluded the Supplemental NPRM by stating that it was "considering adding provisions [to the proposed rule] that will make it a violation for an employer to discourage employee reporting in these ways." *Id.* Significantly, OSHA did not identify what types of programs it considered to be "retaliatory," and did not refer to any incident-based safety incentive programs or post-accident drug testing programs.

Thereafter, on May 12, 2016, OSHA published its Final Rule. 81 FED. REG. 29,624. As part of the New Rule, OSHA added, in relevant part, the anti-discrimination and anti-

[8] All comments opposing the proposed Rule, including those of the Plaintiffs, are contained in the Administrative Record (A.R.), which has not yet been filed with the Court. However, the A.R. is available electronically and accessible to the Court through the government's www.regulations.gov website. Plaintiffs specifically incorporate by reference the following comments filed in opposition to the proposed Rule: Comments of Great American Insurance Companies; Comments of the Coalition for Workplace Safety; Comments of Associated Builders and Contractors; Comments of the Chamber of Commerce of the United States; and Comments of the National Association of Manufacturers.

retaliation provisions in Sections 1904.35, titled "Employee involvement." Revised Section 1904.35(b) states, in relevant part:

> (b) Implementation—(1) What must I do to make sure that employees report work-related injuries and illnesses to me?
>
> (i) **You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;**
>
> (ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;
>
> (iii) You must inform each employee that: (A) Employees have the right to report work-related injuries and illnesses; and (B) **Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and**
>
> (iv) **You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness** [emphasis added].

In describing the basis for the New Rule, OSHA stated:

> The final rule adds paragraph (b)(1)(iv) to § 1904.35 to incorporate explicitly into part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses that is already imposed on employers under section 11(c) of the OSH Act. As discussed in the Legal Authority section of this preamble, paragraph (b)(1)(iv) of the final rule does not change the substantive obligations of employers.

81 FED. REG. at 29,671. Notably, OSHA acknowledged that the New Rule expands OSHA's enforcement authority beyond the authority granted to it by Congress in Section 11(c) of the OSH Act, which bars retaliation against a worker for reporting a workplace injury or illness. *Id.* Specifically, OSHA admitted that "Section 11(c) only authorizes the Secretary to take action against an employer for retaliating against an employee for reporting a work-related illness or injury if the employee files a complaint with OSHA within 30 days of the retaliation." *Id*. (citing

29 U.S.C. 660(c)). Taking the legislative process into its own hands, however, OSHA gave itself "an additional enforcement tool" that allows it to "issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed a section 11(c) complaint." *Id*.

OSHA made it clear what it will target with this self-declared "enforcement tool" for the first time in the Preamble discussion of the New Rule. One new target is incident-based safety incentive programs, which promote safety by offering rewards to employees who avoid workplace accidents. Thus, according to OSHA,

> [i]t is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program. Therefore, it is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.

81 FED. REG. at 29,674. Another target is blanket post-accident drug testing programs:

> [D]rug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.[9] For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an

[9] Although the language in the Preamble to OSHA's Final Rule focuses solely on "automatic post-injury drug testing," OSHA has consistently identified alcohol as a "socially acceptable drug" and addressed alcohol as a factor in its drug free workplace program initiatives. *See e.g., Drug Free Workplace Alliance,* OSHA, https://www.osha.gov/dcsp/alliances/drug_free/ (identifying issues related to drug and alcohol use in the workplace). *See also,* Letter from John B. Miles to Patrick J. Robinson, Safety Coordinator, Star line Mfg. Co., (May 2, 1998), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS.

> employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

81 FED. REG. 29,673.

The fact that these statements set forth definitive OSHA positions on the intent and scope of the New Rule makes them reviewable as an integral part of the Rule itself, as courts have previously held. *U.S. Air Tours v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002); *Kennecott Utah Copper v. U.S. Dept. of Interior*, 88 F.3d 1191, 1222-1223 (D.C. Cir. 1996).

III. LEGAL STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

To secure a preliminary injunction, Plaintiffs must demonstrate (1) a substantial likelihood of success on the merits of their case; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any damage that the injunctive order might cause the Defendants; and (4) that the order will not be adverse to the public interest. *Women's Med. Ctr. v. Bell,* 248 F .3d 411, 418-20, n.15 (5th Cir. 2001); *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.,* 600 F.2d 1184, 1187 (5th Cir. 1979); *Barton v. Huerta,* 2014 WL 4088582, at *I (N.D. Tex. 2014), *affd,* 613 F.App'x 426 (5th Cir. 2015). To preserve the status quo, federal courts regularly enjoin federal agencies from implementing and enforcing new regulations pending litigation challenging them. *See, e.g., Texas v. U.S.,* 787 F.3d 733 (5th Cir. 2015) (enjoining executive order inconsistent with immigration statutes)*; Nat'l Fed'n of Ind. Bus. v. Perez,* Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016) (preliminarily enjoining DOL's "persuader" rule as violative of Congressional intent under the LMRDA). Here, all four factors strongly support granting injunctive relief, as will be shown in the remainder of this brief.

The standard of review to be exercised by a court reviewing a final agency action under the APA is articulated in *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* analysis is a two-step process. Under *Chevron* Step 1, the Court asks whether

Congress has directly spoken to the precise question at issue. *Id*. at 842. If Congress has spoken, then that is the end of the analysis, and the Court "must give effect to the unambiguously expressed intent of Congress" without showing any deference to the defendant agency. *Id.* at 843. *See Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015) (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'").

It is well settled under *Chevron* that an agency may not presume a delegation of authority by Congress but instead bears the burden of establishing an actual delegation of such authority. *See Texas v. U.S. Dept. of Interior,* 497 F. 3d 491, 502 (5th Cir. 2007) ("When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken."), *citing Railway Lab. Executives Assn. v. National Mediation Board,* 29 F. 3d 655 (D.C. Cir. 1994) *(en banc). See also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (overturning DOL rule where the agency "exercise[d] its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.").

Under *Chevron* Step 2, the Court may defer to the agency's interpretation of the statute only if it is a permissible and reasonable construction of the statute. *Chevron*, 467 U.S. at 843-44. Importantly, deference is only owed to an agency if its construction is reasonable in light of the statute's text, history, and purpose. *S. Cal. Edison Co. v. F.E.R.C.*, 116 F.3d 507, 511 (D.C. Cir. 1997). As the Supreme Court has further observed: an agency is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and

prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994).

The Supreme Court – only a few weeks ago – made clear that the Department of Labor is not entitled to *Chevron* deference where it fails adequately to explain reversals of longstanding policy. Thus, in *Encino Motorcars, LLC v. Navarro*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (2016), the Court held that the Department is required to "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." "In such cases … a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." It follows that an "unexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.*; *See also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

IV. STANDING AND RIPENESS

Plaintiffs have standing to bring this action, and it is ripe for review. Plaintiffs TEXO, ABC, NAM, and AFPM are Texas and/or National trade associations whose members rely on incident-based safety incentive programs and routine, mandatory post-accident drug testing to maintain safe workplaces, which the New Rule for the first time declares to be "retaliatory" and subject to civil penalties. Many of the Plaintiff associations' members will be irreparably harmed by the New Rule in their ability to reduce workplace injuries and illnesses, for the reasons stated in greater detail below. The association Plaintiffs have standing to bring this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have

standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members. *See, e.g.,* EX. 1, APP. 001-004, Declaration of TEXO President Meloni McDaniel; and EX. 3, APP. 017-020, Declaration of ABC Vice President Greg Sizemore.

Plaintiff Great American is an insurer who provides workers' compensation insurance to hundreds of employers, the success of which is heavily dependent on incident-based safety incentive programs to reduce workplace injuries and illnesses. *See* Ex. 2, APP. 005-016, Declaration of Jason Cohen. Plaintiffs Atlantic Concrete, Oxford and Owen Steel are insured employers who purchase workers' compensation insurance from Great American through its Strategic Comp business unit and who have successfully implemented incident-based safety incentive programs upon Strategic Comp's recommendation. Plaintiffs Atlantic Concrete, Oxford, and Owen Steel also require their employees to undergo routine post-accident drug testing programs as another means of reducing workplace injuries and illnesses. Many of the Plaintiffs' employer members and/or insureds are faced with immediate and irreparable harm when the New Rule goes into effect on August 10, 2016 if they continue to carry out their safety incentive and/or drug testing programs in the interest of reducing workplace injuries and illnesses, making this New Rule ripe for review. *See Texas v. Dept. of Interior*, 497 F.3d 491 (5th Cir. 2007) (finding challenge to final administrative regulations ripe for review).

IV. ARGUMENT

A. Plaintiffs Will Likely Succeed On The Merits.

In their Complaint, Plaintiffs challenge OSHA's New Rule asserting jurisdiction to enforce retaliation claims on multiple independent grounds, each of which on its own is enough to render the New Rule void and unenforceable. Each of these challenges is discussed below.

1. OSHA's New Rule Significantly Exceeds The Agency's Statutory Authority Under Section 11(c).

As explained above, in Section 1904.35 of the New Rule, OSHA created anti-discrimination and anti-retaliation provisions that are nowhere found in or authorized by Section 11(c) of the OSH Act. OSHA acknowledged that "Section 11(c) only authorizes the Secretary to take action against an employer for retaliating against an employee for reporting a work-related illness or injury if the employee files a complaint with OSHA within 30 days of the retaliation," but nevertheless proceeded to arrogate to itself authority to adopt an "additional enforcement tool" that Congress plainly did not authorize. *Id*. OSHA has thereby given itself the ability for the first time to penalize employers who maintain incident-based safety incentive programs or routine, post-incident drug testing programs, threatening to impose penalties of up to $12,471 per violation not characterized as a repeated or willful violation, and up to $124,712 per violation characterized as a repeated or willful violation. *See* https://www.osha.gov/penalties.html.[10]

Such executive overreach constitutes unlawful agency action of the type that has been struck down on several recent occasions by courts in this Circuit. *See, e.g*., *Texas v. U.S.,* 787 F.3d 733 (5th Cir. 2015) (Presidential executive order held to violate federal immigration statutes)*; Nat'l Fed'n of Indep. Bus. v. Perez,* Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016) (Labor Department rule redefining persuader activity held to exceed Congressional delegation of authority under the LMRDA). Using all the "tools of statutory construction" to determine whether Congress has spoken to the issue, it is abundantly clear that the New Rule violates the plain language and Congressional intent underlying the OSH Act and must be vacated. *See Ragsdale ,* 535 U.S. at 91.

[10] As further noted above, OSHA now claims authority to extend the time for issuing citations under the foregoing provisions beyond the statutorily restricted 30-day period specified in Section 11(c), up to a period of six months. *Id*.

As noted above, the legislative history of the OSH Act makes clear that Congress considered, and rejected, giving OSHA the kind of tool that the agency has now given itself in the New Rule. Conference Report No. 91-1765 (December 16, 1970), 91st Cong., 2d Sess. (1970), *reprinted in* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1192. In other words, Congress explicitly withheld from OSHA the authority to initiate enforcement actions or issue citations for alleged unlawful discriminatory conduct or retaliation prohibited by Section 11(c); and it implicitly withheld from OSHA the authority to prescribe substantive anti-discrimination rules.

OSHA suggests in the New Rule that Sections 8 and 24 of the Act provide legal authority for the New Rule's anti-retaliation provisions. 81 FED. REG. at 29,671. However, these provisions solely address regulatory requirements for recordkeeping; nowhere do they authorize OSHA to create a new non-discrimination provision separate and distinct from the explicit provisions set forth in Section 11(c).[11] Indeed, "Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not…hide elephants in mouseholes." *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). In holding that the FDA did not have Congressional authority to regulate tobacco, the Supreme Court declared: "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 160 (2000); *see also Ragsdale,* 535 U.S. at 91 (overturning DOL

[11] OSHA cites to and misapplies *United Steelworkers, AFL–CIO* v. *St. Joe Resources,* 916 F.2d 294, 298 (5th Cir. 1990) for the proposition that Section 11(c) does not provide an exclusive remedy within the Act. In fact, the *St. Joe Resources* decision did not address OSHA rulemaking in any fashion. Rather it was a straightforward appeal of a citation issued under an existing medical removal OSHA Standard. The Court found only that the reference to back pay in Section 11(c) of the statutory text and not in another provision, did not preclude a back pay award as a remedy for a valid OSHA citation. This holding in no way addressed the question whether Congress has delegated authority to OSHA to create an entirely new cause of action and "enforcement tool."

rule where the agency "exercise[d] its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."); *See also Texas v. U.S. Dept. of Interior,* 497 F. 3d at 502 (rejecting a similar agency claim to "presumed" delegation of Congressional authority).

Similarly here, where Congress expressly addressed the issue of retaliation and discrimination in Section 11(c), there is nothing within Sections 8 and 24 that provides support for bypassing Congressional intent through the simple means of promulgating a regulation establishing a civil penalty for discriminatory action, contrary to the text of Section 11(c).

2. The New Rule Violates Sections 8 and 24 of the Act.

Even if Section 11(c) had given OSHA authority to create its own anti-retaliation regulation, which it did not do, nothing in the Act gives OSHA the authority to declare unlawful any employer safety programs that have a demonstrably positive effect on reducing workplace injuries and illnesses, merely in order ensure more accurate recordkeeping. Nevertheless, OSHA has declared that the New Rule prohibits incident-based employer safety incentive programs and routine, mandatory post-accident drug testing programs, even though both types of programs are designed to *promote* safety in the workplace and have been repeatedly been shown to be successful in making workplaces safer. 81 FED. REG. at 29,671-74.

Under Sections 8 and 24 of the OSH Act, the Secretary is permitted to adopt only two forms of recordkeeping regulations: (1) "regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restrictions of work or motion, or transfer to another job;" and (2) regulations requiring employers to keep and maintain records regarding the causes and prevention of occupational injuries and illnesses. *See* 66 FED. REG. 5,916; 29 U.S.C. §§ 657 & 673.

Thus, the OSH Act does not permit OSHA to adopt regulations that go beyond a mandate to employ due diligence to keep accurate records of work-related injuries. Section 8(c)(1) provides that any recordkeeping prescribed by regulation must be necessary or appropriate for the enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. OSHA failed to introduce any evidence during the rulemaking on the New Rule demonstrating there is a significant widespread problem of inaccuracy in the injury and illness records required by OSHA, much less that any such condition is due to use of the Safety Programs now declared by the New Rule to be unlawful. To the contrary, the evidence in the record establishes that incident-based safety incentive programs and post-accident drug testing both help to promote workplace safety, with no adverse impact on timely or accurate reporting.

It must also be noted that OSHA's apparent prohibition in the New Rule against incident-based safety incentive programs and routine post-incident drug testing was made without any assessment of the relative costs and benefits of those practices. Section 8(c)(1) of the OSH Act requires OSHA to weigh the value of drug testing in terms of lives and limbs saved by preventing future workplace incidents against the speculative costs of that testing on the accuracy of OSHA recordkeeping. OSHA must assign a value to the speculative and quite possibly *de minimis* reduction in the accuracy of injury and illness records that would result if the testing program were permitted.

Under Section 8, OSHA was required to determine that the number of individuals who would not report accidents or injuries due to the Safety Programs was significant enough to affect the overall accuracy of the required reports. OSHA was further required to show that improvement in the accuracy of recordkeeping justifies the sacrifice in lives and limbs from

work-related incidents that clearly will result from banning incident-based safety incentives and post-accident drug testing. Instead of carrying out this essential analysis, as required by the OSH Act, OSHA improperly asserted that anecdotes and other available evidence suggesting, at best, a limited *potential* for a reduction in recordkeeping accuracy justified the challenged provisions of the New Rule.

It must also be noted that OSHA's opposition to post-accident drug testing programs is completely contrary to what the Department of Health and Human Services, Substance Abuse Mental Health Services Administration ("SAMHSA") advocates, and is also contrary to requirements for Federal Workplace Drug Testing under Executive Order 12564 and Public Law 100-71 for agencies with drug testing policies for federal employees, and contrary to what the Department of Labor advocates for a Drug-Free Workplace Policy. *See* beta.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf.

OSHA's inclusion of post-accident drug testing as an adverse action also conflicts with the DOL's encouragement of employers to develop Drug-Free Workplace policies. In fact, as part of DOL's elaws there is a Drug-Free Workplace Advisor that helps employers develop a drug free policy. Section 7 of that policy builder requires employers to select the type of drug-testing that the employer will require, and some options include pre-employment, periodic, random, *post-accident*, reasonable suspicion and return-to-duty. *See* http://www.dol.gov/elaws/asp/drugfree/drugs/screen1.asp.

Finally, whereas OSHA asserts in one of its "FAQs" that not all post-accident testing is prohibited by the New Rule, by limiting such drug testing only to those tests which can accurately identify impairment caused by druge use, OSHA has effectively prohibited all post-accident drug testing other than for alcohol. This is so because, aside from alcohol tests, there

are no recognized and accepted drug tests showing actual impairment that are available at this time. This scientific conclusion was recently reaffirmed by the National Highway Traffic Safety Administration (NHTSA), which conducted a peer reviewed panel evaluation of the state of current scientific knowledge in the area of drugs and human performance for 16 commonly abused drugs selected for evaluation. NHTSA found that impairment testing was not available or scientifically accurate for these drugs. http://www.nhtsa.gov/people/injury/research/job185drugs/technical-page.htm. Notwithstanding this finding, the U.S. Department of Transportation has declared that post-accident testing for drugs increases workplace safety, and is therefore required, regardless of whether on-the-job impairment can be shown to have caused the accident in question. *See, e.g.*, 49 C.F.R. Part 382.

3. The New Rule Violates Section 4(b)(4) of the Act by Interfering With State Workers' Compensation Laws That Mandate or Encourage Post-Accident Drug Testing.

As noted above, Section 4(b)(4) of the OSH Act, 29 U.S.C. 653(b)(4), states that "nothing in this Act shall be construed to supersede or in any manner affect any workers' compensation law" nor to affect any "statutory rights of employers" under such laws. But by prohibiting routine, mandatory post-accident drug testing, the New Rule directly affects the majority of all state workers' compensation laws, which require employers to implement a drug free workplace program. Some states mandate drug testing as part of the larger drug free workplace requirements,[12] while many other states *encourage* post-accident drug testing by offering discounts. For example, under Florida's Workers' Compensation Statute, Section 440.09, employers who maintain a drug-free workplace program, pursuant to sections 440.101 and 440.102, may *require* employees to submit to post-accident accident drug testing where

[12] *See, e.g.*, Georgia Code 34-9-415 (employer who maintains a drug-free workplace program is required to conduct specified kinds of testing, including post-accident); *see also* Ala. Code §§ 25-5-330 *et seq.* (2012).

there is "information that an employee has caused, contributed to, or been involved in an accident while at work." Fla. Stat. 440.102(n)(5). The results of such testing can be used in negating an employer's liability under Florida's workers' compensation. Fla. Stat. 440.09(7). It is also common for state workers' compensation programs to provide employers special discounts on their insurance premiums or protect them from certain actions in damages. *See* Minn. Stat. Ann. § 176.0001 *et seq*.; Minn. Stat. Ann. § 181.950 *et seq*.

In the preamble to the New Rule, OSHA purports to address the workers' compensation issue by declaring that the New Rule will not apply where the state law "require[s]" post-accident drug testing. 81 Fed. Reg. at 29,673. But this "safe harbor" is not sufficient to save the New Rule from violating Section 4(b)(4) of the Act, because the workers' compensation laws that "encourage" post-accident drug testing in the ways discussed above are clearly "affected" by OSHA's unprecedented effort to ban such programs. Courts have held that Section 4(b)(4) of the Act is "intended to protect worker's compensation acts from competition by a new private right of action and to keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself." *Pratico v. Portland Terminal Co*., 783 F.2d. 255, 266 (1st Cir. 985). By prohibiting employers from conducting routine post-accident drug testing programs of the type that workers' compensation programs require or merely encourage, the New Rule clearly affects workers' compensation statutes in many states and thus violates Section 4(b)(4).

4. OSHA Failed Give Adequate Notice Of The New Rule's Anti-Retaliation Provisions In Violation Of The Administrative Procedure Act.

As noted above, OSHA nowhere mentioned in its NPRM or Supplemental NPRM that it was considering a ban on incident-based safety incentive programs or routine, mandatory post-accident drug testing programs. It was therefore a violation of the Administrative Procedure Act

for OSHA to proceed to issue the New Rule in final form without having provided an opportunity for comment on its provisions. *See CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009) (final rule fails the logical outgrowth test and thus violates the APA's notice requirement where "interested parties would have had to 'divine' [the agency's] unspoken thoughts…."). It is undisputed that OSHA provided no regulatory text for the public to provide comment on, and the agency accordingly received little if any comment on what turned out to be the central focus of the New Rule's anti-retaliation provisions. This unprecedented rulemaking procedure violated the Notice and Comment requirements of the APA and the New Rule must be vacated on this ground as well.

5. The "Anti-Safety" Provisions Of The New Rule Are Arbitrary and Capricious And Entitled To No Deference.

As discussed above, OSHA's primary mission is supposed to be the reduction of workplace injuries and illnesses. By elevating reporting accuracy over workplace safety, however, and failing to prove any material level of reporting inaccuracies, the New Rule declares unlawful Safety Programs that demonstrably reduce workplace injuries. Such an irrational and internally inconsistent policy is not entitled to *Chevron Step II* deference and/or is arbitrary and capricious.

Indeed, the Supreme Court has recently made clear that the Department of Labor is not entitled to *Chevron* deference where it fails adequately to explain inconsistent reversals of longstanding policies. *Encino Motorcars, LLC v. Navarro*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (June 20, 2016). Of particular relevance here, OSHA has reversed longstanding policy regarding the process for handling recordkeeping retaliation issues without showing any "cognizan[ce] that longstanding policies may have engendered serious reliance interests that must be taken into account." The agency has also provided no "reasoned explanation" for

disregarding facts and circumstances that underlay or were engendered by the prior policy." Furthermore, the New Rule contains many "unexplained inconsistencies," all of which constitute grounds for holding OSHA's New Rule to be an arbitrary and capricious change from agency practice." *Id*. *See also Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).[13] For all of these reasons, the New Rule must be set aside, as further explained below.

OSHA's entire premise for prohibiting employer Safety Programs in the New Rule is that such programs somehow discourage employees from accurately reporting injuries and illnesses. Yet OSHA has cited no scientific evidence in support of this claim, and it is contradicted by substantial evidence in the administrative record. OSHA merely cited anecdotal evidence that some programs "may" or "could" discourage reporting of injuries or illnesses. 81 FED. REG. at 29,673. None of these anecdotal reports, including those contained in the 2012 GAO study or a 2008 House Report cited by OSHA, established any link at all between incident-based safety incentive programs and decreased workplace safety (as opposed to mere recordkeeping requirements); indeed there is no evidence that safety incentive programs have anything but a positive effect on reducing workplace injuries and illnesses, which is supposed to be OSHA's primary mission.[14] Indeed, the 2012 GAO report reviewed a number of studies evaluating safety incentive programs and found that three of those studies concluded that incentive programs reduced injuries. *See* United States Government Accountability Office

[13] The *State Farm* Court held that an agency action is deemed to be arbitrary and capricious if any of the following are met: (1) the agency relied on factors which Congress has not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency offered an explanation for its decision that runs counter to the evidence; or (4) the agency's explanation is so implausible that it could not be ascribed to agency expertise. *Id*. Here, all of these factors support a finding of arbitrary and capricious agency action.

[14] In the one reported decision where OSHA claimed that an incentive program discouraged reporting, that contention was rejected because OSHA's evidence was not credible. See *Secretary v. Trico Tech. Corp*., OSHRC Docket No. 9100110 (1993). For instance, while one witness testified "he was afraid to report injuries," he did in fact report a hernia.

Report to Congressional Requesters on Workplace Safety and Health, GAO-12-329 (April 2012) ("2012 GAO Report").

Moreover, in data submitted to OSHA, Plaintiff Great American through its Strategic Comp business unit showed that the incidence of indemnity claims (*i.e.*, serious claims that cause an employee to either lose time from work, have a permanent impairment, or both) made by its insureds fell 39% in their first year in the Strategic Comp insurance program. *See Strategic Comp's Comments to* OSHA Docket No. OSHA-2013-0023, available at www.regulations.gov. Additionally, Strategic Comp presented evidence in the record demonstrating that over the last five years, its insureds' accident costs were 39% less than predicted by the National Council of Compensation Insurance ("NCCI") actuaries. The data also showed that Strategic Comp's insured's had 58% fewer catastrophic claims than actuarially predicted. There is no doubt that the Employer Safety Incentive Programs played a significant part in these results.

The record evidence about routine, mandatory post-accident drug testing is similarly conclusive in favor of this Safety Program. According to the U.S. Department of Labor's own statistics, drug-using employees are 3.6 times more likely to be involved in a workplace accident and 5 times more likely to file a workers' compensation claim.[15] As a result, the business case for post-accident drug testing is clearly compelling. Positivity rates for post-accident workplace drug testing and empirical studies indicating reductions in workplace accidents corresponding to post-accident drug testing make it even more so.

Quest Diagnostics, the largest toxicological testing company in the world, reports in its Spring 2015 Employer Solutions Annual Report – Drug Testing Index, which is a comprehensive analysis of workplace drug use trends, that post-accident testing yields high numbers of positive

[15] http://webapps.dol.gov/elaws/asp/drugfree/benefits.htm, *DOL Drug-Free Workplace Advisor Backer*, citing *Strategic Planning for Workplace Drug Abuse Programs*, p. 4. National Institute on Drug Abuse. Rockville, MD. 1987.

test rates in the general U.S. workforce. In the general U.S. workforce, from 2010 through 2014, urine drug tests positive rates for post-accident drug tests ranged and increased from 5.3% in 2010 to a high of 6.5% in 2014. With more than 6.6 million urine drug tests conducted in the general U.S. workforce in 2014, even high level extrapolation yields very grave numbers, as surely the total number of positive post-accident drug tests in 2014 alone was in the tens of thousands.[16]

In the same 2010-2014 time frame, for federally-mandated, safety-sensitive workforce testing, which, with the inception of DOT testing in 1988, has been generally *required* over a longer period of time than non-regulated testing, positivity rates for post-accident urine drug tests ranged and increased from 2.2% in 2010 to a high of 2.6% in 2014. Presumably, lower rates attached than in the general U.S. workforce because mandated post-accident testing has had its intended effect, deterrence of use that could lead to accidents.[17]

Some of the empirical evidence cited by OSHA in support of its new Rule in fact supports post-accident drug testing as a tool to reduce workplace accidents. For example, in *Does Post-Accident Drug Testing Reduce Injuries? Evidence from a Large Retail Chain,*[18] Morantz and Mas conclude in their study of the effects of workplace injury claims a post-accident drug testing program in a large retail chain that claims fell significantly, suggesting that such, "programs can reduce injury claims, even in workplaces that already utilize other forms of drug testing."[19] Likewise, the Drug & Alcohol Testing Industry Association (DATIA) and the

[16] Oral fluids testing post-accident testing rates were comparable, ranging in the General U.S. Workforce from 3.9% in 2010 to a high of 4.9% in 2014.
[17] *See infra*, Morantz and Mas at p. 250.
[18] American Law and Economics Review 10(2): 246—302, Morantz and Mas (2008).
[19] The authors (and OSHA) speculate that, based on "circumstantial evidence" and psychological theories about factors that "may" affect willingness to participate in a drug testing program and "possible" privacy concerns, underreporting may have occurred, but concede that substantial evidence demonstrated behavior alteration in response to PADT, id. at p. 294, and further suggest that, at least as to oral fluids post-accident drug testing, which is far less intrusive than blood or urine testing, that, "it would be surprising if a large number of employees – other

Society for Human Resource Management (SHRM) reported in a 2011 survey of human resource professionals that companies with high workers' compensation incidence rates reported a drop from 14 percent to 6 percent after implementing drug testing programs, an improvement of 57 percent.[20]

Again, OSHA did not provide any evidence that the implementation of post-incident testing of injured employees when not required by federal or state law was in fact retaliatory. Instead, OSHA cited only a perceived invasion of privacy from such testing as the reason why employees purportedly chose not to report workplace injuries or illnesses. *See* 81 Fed. Reg. 29,663. OSHA claimed that requiring automatic post-injury drug and alcohol testing "is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting." 81 Fed. Reg. at 29,673. However, protecting worker privacy in this context is not within OSHA's authority and therefore does not provide a legitimate rationale for the New Rule. *See State Farm Mutual, supra* (agency reliance on factors that Congress did not intend it to consider held to be grounds for a finding of arbitrary and capricious rulemaking). Even if OSHA was authorized to protect workers' privacy in this fashion, it is arbitrary and capricious and a clear abuse of discretion to allow speculative considerations of employee privacy to outweigh the prevention of injuries, illnesses and deaths.

OSHA also failed to explain why allowing, as the New Rule does, Post-Incident Testing in instances where an individual (typically a supervisor) without any law enforcement training

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than those who feared the consequences of a positive result – were deterred from reporting merely because of the psychic costs of undergoing the test," id., at p. 295, n. 68.

[20] *SHRM Poll: Drug Testing Efficacy*, SHRM *in collaboration with* the Drug and Alcohol Testing Industry Association (DATIA) (September 7, 2011).

has determined there is some evidence of reasonable suspicion – "a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness" – will not deter reporting and not infringe privacy to a similar degree as routine post-incident testing. Rather, OSHA apparently assumed, without any analysis, that post-incident testing in those instances deserves special treatment because it has a substantially higher probability of detecting an individual who poses a future threat due to substance abuse. Further, OSHA failed to provide any analysis of (1) how employers, as distinguished from trained police forces, would be in a position to make reasonable suspicion determinations, (2) the cost of finding and training personnel qualified to perform those tasks, (3) the cost of implementing such a system, and (4) the impact on employee morale of having the worksite under the surveillance of a trained police force.

As further noted above, by limiting such drug testing only to those tests which can accurately identify impairment caused by druge use, OSHA has effectively prohibited all post-accident drug testing other than for alcohol. NHTSA's peer reviewed panel evaluation of the state of current scientific knowledge for 16 commonly abused drugs has confirmed that impairment testing is not available the most common workplace drugs, but that does not make their use any safer. http://www.nhtsa.gov/people/injury/research/job185drugs/technical-page.htm. Again, the U.S. Department of Transportation has declared that post-accident testing for drugs increases workplace safety, and is therefore required, regardless of whether on-the-job impairment can be shown to have caused the accident in question. *See, e.g.*, 49 C.F.R. Part 382.

6. OSHA's Failure To Conduct A Proper Regulatory Flexibility Act Analysis Was Arbitrary And Requires The New Rule To Be Vacated.

The Regulatory Flexibility Act, 5 U.S.C. 601 ("RFA") requires an agency that has proposed a rule to prepare and make available for public comment an initial and final regulatory

flexibility analysis. The initial flexibility analysis "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a) (2012). The final regulatory flexibility analysis, which is provided in connection with the promulgation of a final rule, requires a description of (i) the reasons why action by the agency is being considered, (ii) a succinct statement of the objectives of, and legal basis for, the proposed rule, (iii) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply, and (iv) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small businesses. *Id.*

An agency can avoid performing these analyses if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The certification must include a statement providing the factual basis for the agency's determination that the rule will not significantly impact small entities. 5 U.S.C. § 605 (2012).

DOL certified that its new anti-retaliation rule would not have significant economic impact on a substantial number of small entities. 81 FED. REG. at 29,687. In making this certification, OSHA considered that it was making only four (4) changes to the recordkeeping rules, none of which included the non-discrimination provision. *Id.* at 29674. After recognizing that its Supplemental NPRM did not assign any costs to the non-discrimination provision additions to the rule, in the New Rule OSHA assigned one cost analysis – posting of a newly revised OSHA poster. *Id.* at 29680. OSHA did not in any manner whatsoever attempt to analyze the impact of its creation of a duplicative, new administrative litigation procedure for enforcing non-discrimination provisions through citations and penalties. At a minimum thousands of small business employers will be required to suspend and rewrite their post-accident drug testing and

incident-based safety incentive programs in order to comply with the New Rule. OSHA's omission of any analysis of the costs of compliance with the disruptive and unprecedented changes to longstanding policy is utterly arbitrary and compels an injunction against the New Rule until such an analysis is completed.

B. The Plaintiffs Meet the Remaining Three Criteria for a Preliminary Injunction

1. Plaintiffs Will Suffer Irreparable Harm Unless The Rule Is Enjoined.

An employer who fails to comply with the New Rule is subject to potentially severe sanctions in the form of citations and penalties.[21] Once the New Rule goes into effect, Plaintiffs' (and many other employers') only means of avoiding such penalties will be to eliminate or drastically reduce their safety incentive and/or post-accident drug testing programs. Based on the record evidence discussed above and in the attached declarations, such program elimination will adversely affect workplace safety and will increase the likelihood of injuries and illnesses in the Plaintiffs' workplaces. Such injuries and illnesses may include fatalities to Plaintiffs' employees and will certainly include lost work time and goodwill, all of which constitutes irreparable harm. *See National Solid Wastes Management v. City of Dallas,* 903 F. Supp. 2 446, 471 (N.D. Tx. 2012) (threats of fines constituted irreparable harm); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp.2d 858, 878 (N.D. Tex. 2008) (same); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263 (10th Cir. 2004); *Multi–Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.,* 22 F.3d 546, 552 (4th Cir. 1994) (holding that "when the failure to grant preliminary relief creates the possibility of permanent loss of goodwill, the irreparable injury prong is satisfied.").

[21] As noted above, OSHA's penalties for Willful violations will increase to $124,712 per violation on or before August 1, 2016.

To this point, Plaintiffs Atlantic Concrete, Oxford Management, and Owens Steel have each testified in their attached declarations that they have achieved dramatic reductions in their lost time due to workplace injuries as a direct result of their incident-based safety incentive programs. At the same time, these employers have experienced no known failures of employees to report injuries that have occurred, which is consistent with data reported by Great American Strategic Comp's declaration. *See* EX. 2, APP. 005-016, Declaration of Jason Cohen. In addition, many of the association Plaintiffs' members depend on routine, mandatory post-accident testing and/or incident-based safety incentive programs to control or reduce workplace injuries. *See* Declarations of TEXO and ABC (90 percent of TEXO's survey respondents rely on routine, mandatory post-accident drug testing and 80 percent use incident-based safety incentive programs; ABC's national surveys report similarly high numbers of respondents relying on routine, mandatory post-accident drug testing and substantial number of members using incident-based safety incentive programs). *See*, EX. 1, APP. 001-004, Declaration of Meloni McDaniel; EX. 3, APP. 017-020, Declaration of Greg Sizemore.

Each of the Plaintiff Declarants states that they or their members/insureds face a Hobson's choice between confronting increased penalties and inspections if they retain their highly effective safety programs, or else suffering increased employee injuries and even fatalities in their workplaces if they comply with the New Rule by eliminating or drastically reducing their incident-based safety incentive and/or post-accident drug testing programs. These immediate and likely outcomes, including the loss of employee goodwill attached to the Safety Programs, constitute irreparable harm justifying injunctive relief.

Maintenance of safety incentive and post-accident drug testing programs by Plaintiffs will also lead to increased OSHA inspections under the New Rule. Numerous courts have held

that the occurrence of an unauthorized intrusion of the government into a private workplace to conduct an inspection causes injury. *See Cerro Metal Products v. Marshall*, 620 F.2d 964, 974 (1980)(citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)). In finding that an unauthorized OSHA inspection constitutes irreparable harm, the *Cerro* decision acknowledged:

> a typical OSHA inspection is more than an unobtrusive scrutiny. Inspections of entire plants referred to as "wall to wall" in agency jargon frequently extend over several weeks. They necessarily create inconvenience to the employer and a certain amount of lost time for employees who escort the inspector or are otherwise disrupted in their work. Even if no violations were found and no citations issued, an employer would not regard such an inspection as benign.

Id. at 974. *See also U.S. Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999)("The Chamber of Commerce asserts, and the agency does not deny, that as a practical matter being subjected to a safety inspection can be quite as onerous for an employer as paying a fine imposed by the OSHA."); *Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819, 821 (5th Cir. 1976)(granting stay pending appeal of OSHA rulemaking). Even if OSHA issued no citations or penalties following an inspection, employers cannot recover the time or interruptions of their businesses back – the loss and injury is permanent and irreparable.

2. OSHA Will Not Be Harmed By A Preliminary Injunction.

An order for injunctive relief in the present case will simply preserve the status quo and temporarily retain the same interpretation of the non-discrimination provisions in effect for more than forty-five (45) years. There is no evidence that employees will be harmed as a result of this relief. Indeed, OSHA has proceeded with this rulemaking on regulatory basis for establishment of procedural requirements and not a standard setting basis to address a hazard. Moreover, the record is replete with OSHA's admission that the new non-discrimination provision it is

proposing is duplicative of the existing 11(c) protections. Thus, there is no harm in requiring the OSHA to continue to follow its previous interpretation until this matter can be concluded.

In this regard, mere delay of government enforcement does not constitute sufficient harm to deny injunctive relief. *See e.g., Rogers Group, Inc. v. City of Fayetteville*, 639 F.3d 784, 789–90 (8th Cir. 2010) (delay in enforcement of new city ordinance); *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) (delay caused by grant of injunctive relief was insufficient to deny request); *Coteau Properties Co. v. Dep't of Interior*, 53 F.3d 1466, 1480 (8th Cir. 1995) (government agency seeking to enforce a new decision would suffer no harm from delay).

3. The Public Interest Will Be Furthered By Injunctive Relief.

Injunctive relief is necessary to protect the public interest. Public policy demands that a governmental agency be enjoined from acting in a manner contrary to the law. *See*, *e.g., Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012) (likely First Amendment violation by school district favored granting injunction); *Glenwood Bridge*, 940 F.2d at 372 (public policy of ensuring a lawful bidding process outweighed city's need to complete construction project expeditiously). Beyond that, it is in the public interest to continue to promote robust debate and the free and unfettered exchange of information regarding the issue of non-discrimination and safety program components. Indeed, the evidence provided by Plaintiffs establishes that Safety Program Components prevent injuries and illnesses furthering the interests of both OSHA and the public.

V. CONCLUSION – PRAYER FOR RELIEF

For the reasons stated in their Complaint and in this Brief, Plaintiffs pray that the status quo will be preserved and that Defendants will be preliminary enjoined from implementing and enforcing OSHA's New Rule provisions outside of the existing and established Section 11(c)

procedures. Plaintiffs also pray that Defendants will be enjoined from issuing citations and penalties regarding incident-based safety incentive programs and/or routine, mandatory drug testing programs. Plaintiffs pray for all other relief, in law or in equity, to which they are justly entitled.

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Respectfully submitted,

/s/ Steven R. McCown

Steven R. McCown
TX Bar 13466500
Maurice Baskin*
DC Bar 248898
Thomas Benjamin Huggett*
PA Bar 80538

LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201-2931
214.880.8100
214.880.0181 (Facsimile)
smccown@littler.com
mbaskin@littler.com
bhuggett@littler.com

ATTORNEYS FOR PLAINTIFFS

* *pro hac vice* motion pending

Of Counsel:

Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Richard Moskowitz
General Counsel
American Fuel & Petrochemical Manufacturers
1667 K Street NW, Suite 700
Washington, DC 20006
202.552.8474

Lawrence P. Halprin
Douglas Behr
Keller and Heckman, LLP
1001 G St., N.W.
Suite 500 West
Washington, D.C. 20001
202-434-4177

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF system for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF Registrants:

Spencer Amdur, Esq.
Trial Attorney
Federal Programs Branch
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
spencer.amdur@usdoj.gov

/s/ Steven R. McCown
Steven R. McCown

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