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**

REPLY TO OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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*

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

In opposing Plaintiffs' Emergency Motion for Preliminary Injunction, OSHA claims for itself virtually unlimited authority to enact a new enforcement process for recordkeeping retaliation claims, effective November 1, 2016. OSHA specifically asserts that it is not bound to adhere to the exclusive, carefully balanced anti-retaliation provisions of Section 11(c) of the Act. Instead, OSHA claims "presumed" statutory authority derived from its general rulemaking power and the absence of an express Congressional prohibition against the New Rule. As Plaintiffs explain below, however, the Supreme Court and the Fifth Circuit have squarely rejected similar agency claims of presumed statutory authority. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000); *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 91 (2002); *Texas v. U.S. Dept. of Interior*, 497 F.3d 491 (5th Cir. 2007).

OSHA further claims that the New Rule is somehow not ripe for review. But the law is clear in this Circuit that final agency action can and should be reviewed by the courts where plaintiffs have demonstrated hardship and present purely legal questions to the Court, as is true here. *Texas v. EEOC,* 2016 U.S. App. LEXIS 11735 (5th Cir. June 27, 2016); *Texas v. U.S. Dept. of Interior*, 497 F.3d at 498. Equally unavailing is OSHA's attempt to escape review by attempting to disclaim the binding effect of the agency's preamble, which imposes severe legal consequences on Plaintiffs' safety programs. As Plaintiffs further show below, the case law is clear that definitive agency statements in rulemaking preambles that have "legal consequences" are subject to review by the courts. *NRDC v. EPA*, 571 F.3d 1245, 1252 (D.C. Cir. 2009).

OSHA's Opposition fails to justify the agency's arbitrary reversal of decades of policy, under which OSHA has never before prohibited incident-based safety incentive programs or post-accident drug testing programs under any section of the Act. As further demonstrated below, OSHA fails to meaningfully address the Supreme Court's recently stated requirements

that an agency must acknowledge and adequately justify departures from precedent, must take cognizance of reliance interests in longstanding policies, and must explain apparent inconsistencies in new rules. *Encino Motorcars, LLC v. Navarro*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (2016). The New Rule fails on all counts.

Finally, OSHA's Opposition fails to refute Plaintiffs' showing of irreparable harm. Having presented no contrary data, OSHA cannot deny that incentive-based incentive programs and post-accident drug testing programs make workplaces safer. By prohibiting such safety programs, the New Rule threatens irreparable harm to Plaintiffs by increasing the likelihood of injuries to their employees, and by subjecting Plaintiffs to increased likelihood of inspections, citations, severe penalties, and loss of goodwill.

For all of the reasons more fully explained below and in Plaintiffs' Opening Memorandum, OSHA's Opposition fails to justify the unlawful New Rule, and the Preliminary Injunction should issue to preserve the status quo pending a decision on the merits. Plaintiffs renew below their request for a hearing on these important issues.

II. ARGUMENT

A. OSHA'S Opposition Fails To Refute Plaintiffs' Likelihood Of Success On The Merits.

1. OSHA's Claim Of Unlimited Authority To Exceed The Boundaries of Congressional Authorization Under Section 11 of the Act Is Both Dangerous And Wrong.

As pointed out in Plaintiffs' Opening Memorandum, Section 11(c) of the OSH Act establishes the exclusive process for handling discrimination and retaliation complaints under the Act. 29 U.S.C. § 660(c). Congress expressly mandated that such complaints be handled by the district courts after a 30-day complaint period, not by OSHA citations occurring as much as six months after the alleged retaliatory act. Congress contemplated and specifically *rejected* making

retaliation and/or discriminatory actions subject to the OSHA citation enforcement process. *See* Conf. Rep. 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 response, OSHA claims that its authority to create an entirely new anti-retaliation enforcement provision derives not from Section 11(c), but from Sections 8 or 24 of the Act, which say nothing of the sort. (OSHA Opp. at 8 - 15). At the outset, it must be observed that this is the first time in the history of the Act that the agency has claimed authority under any provision other than Section 11(c) to cite an employer for retaliating against employees. OSHA's Opposition certainly cites no previous exercise of such authority by the agency. OSHA's Opposition is also forced to acknowledge that the plain language of Section 11(c) applies to the exercise of "*any* right afforded by [the Act]." (OSHA Opp. at 11) (emphasis in original). By these admissions, and by failing to contest the legislative history recited in Plaintiffs' Opening Memorandum, OSHA has effectively conceded that the New Rule violates the plain language of the OSH Act, within the meaning of *Chevron* Step I.

OSHA's Opposition relies heavily, and mistakenly, on *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 for employer misconduct under the Act. (OSHA Opp. at 12-13). In relying on that case, OSHA misunderstands Plaintiffs' objection to the New Rule. It is not that Section 11 precludes any and all "remedies" to claims of retaliation. Rather, Plaintiffs contend that the New Rule *creates an entirely new enforcement scheme* to deal with retaliation claims, a scheme that Congress expressly considered and rejected in crafting Section 11's exclusive retaliation enforcement provisions.

The *St. Joe Resources* decision did not address any newly created OSHA enforcement process, because OSHA did not then (or ever until now) claim authority to create such an unprecedented new process departing from the provisions of Section 11(c). Instead, *St. Joe Resources* dealt only with the distinct question of whether OSHA could award backpay after properly citing an employer for an infraction arising under OSHA's existing Medical Removal Standard. The Court's holding in no way addressed the question whether Congress delegated authority to OSHA to create an entirely new "enforcement tool."[1]

It is telling that OSHA fails even to address or distinguish the numerous cases cited in Plaintiffs' Opening Memorandum, at pp. 13 and 17-18, that require agencies to bear the burden of showing that Congress has delegated authority to them to act on a specific subject matter. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. at 160; *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"); *see also Texas v. U.S.,* 787 F.3d 733 (5th Cir. 2015); *Texas v. U.S. Dept. of Interior,* 497 F. 3d at 502; *Nat'l Fed'n of Indep. Bus. v. Perez,* 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016).

Texas v. U.S. Dept. of Interior, decided by the Fifth Circuit and nowhere refuted in OSHA's Opposition, is particularly instructive as to why OSHA's claimed presumption of authority for the New Rule must be rejected. There as here, a federal agency claimed that its governing statute's broad purposes implicitly delegated authority to the agency to issue rules on

[1] OSHA's Opposition claims that it "makes no difference" that the Fifth Circuit ruled in the context of an enforcement challenge to an existing rule rather than a facial challenge to a new rule. (OSHA Opp. at 13, n.13). OSHA again misses the point of Plaintiffs' Motion. It makes all the difference that Plaintiffs are challenging a new enforcement *process* for retaliation claims adopted by OSHA for the first time in the history of the Act, whereas in the *St. Joe Resources* case OSHA was applying an existing standard and enforcement process, and the only issue was the choice of backpay as a remedy.

any matter as to which Congress failed to *prohibit* agency action. The Fifth Circuit held as follows, 497 F.3d at 502:

> 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. * * * Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well. (citations omitted).

Under the foregoing judicial authority, OSHA's reliance on Sections 8 and/or 24 of the Act is fatally undermined by the fact that those provisions are completely silent as to procedures for handling any retaliation or discrimination claims. Nowhere do Sections 8 or 24 authorize OSHA to create a new non-discrimination enforcement provision separate and distinct from the explicit provisions set forth in Section 11(c). 29 U.S.C. §§ 657 & 673.[2] Thus, having conceded that Congress explicitly mandated that retaliation claims as to "any rights" protected by the Act must be enforced in the manner dictated by Section 11, OSHA cannot now claim a delegation of power to adopt an "additional enforcement tool" that Congress plainly did not authorize. For all the foregoing reasons, OSHA's New Rule must be vacated under *Chevron* Step I.

2. Contrary To OSHA's Opposition, The New Rule And Its Preamble Constitute Final Agency Action That Is Plainly Ripe For Review.

Plaintiffs' Opening Memorandum explained why the present challenge to the New Rule is ripe for review, citing the Fifth Circuit's holding in *Texas v. U.S. Dept. of Interior*, 497 F.3d at

[2] As further shown in Plaintiffs' Opening Memorandum, if Section 8 had authorized OSHA's new enforcement program, OSHA would have violated any such authorization by failing to introduce any evidence 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. Section 8(c)(1) of the OSH Act also requires OSHA to weigh the safety value of such programs against the speculative impact of the programs on the accuracy of OSHA recordkeeping. OSHA's Opposition does not address these requirements.

498. (Pl. Mem. at 15). There, the Fifth Circuit held that a rulemaking challenge was ripe where the plaintiffs made a purely legal challenge to final agency action, and the plaintiffs were harmed by "being forced to modify their behavior in order to avoid future adverse consequences." *Id*. at 498-99. Just so here, Plaintiffs are challenging a final OSHA rule on purely legal grounds, and they will be forced to modify or eliminate their safety programs in order to avoid the adverse consequences of the New Rule when it takes effect on November 1.

Without addressing the above referenced ripeness standard of the Fifth Circuit, OSHA's Opposition nevertheless claims that the court should "typically wait until a rule has been applied before granting review." (OSHA Opp. at 17). That is not the law in this Circuit (or elsewhere). In so stating, OSHA has relied on an incomplete and misleading quote from an earlier case, *Central & South West Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000).[3] Contrary to OSHA's Opposition, courts in this circuit have followed the Fifth Circuit's *Texas v. Dept. of Interior* holding that final agency rules and/or guidelines are ripe for challenge prior to their being enforced. *See Texas v. EEOC,* 2016 U.S. App. LEXIS 11735 (5th Cir. June 27, 2016) ("Having determined that [agency guidance] is final agency action under the APA, it follows naturally that [plaintiff's] APA claim is ripe for review"); *Texas v. United States,* 2016 U.S. Dist. LEXIS 113459, at **26-27 (N.D. Tex. Aug. 26, 2016) (finding pre-enforcement agency guidance on transgender bathrooms to be final agency action ripe for review); *Nat'l Fed'n of Indep. Bus. v. Perez,* 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016) (enjoining Labor Department's new persuader rule prior to enforcement).

[3] OSHA's Opposition offers the following quotation from *Central & South West Servs*.: "Typically, in the context of rulemaking," courts "wait until a rule has been applied before granting review." (OSHA Opp. at 17). OSHA failed to include an ellipsis indicating interruption of the quote, however. The actual sentence continues in the original as follows: "however, this prudential concern loses force … when the question presented is purely legal." *Id*. at 690.

OSHA's Opposition further incorrectly asserts that its New Rule is somehow immune from challenge because some of its offending aspects are found in the agency's preamble. (OSHA Opp. at 15-17). But the case on which OSHA primarily relies dealt only with a preamble that was "equivocal" and "hypothetical," including a "typographical error." *See, e.g.*, *NRDC v. EPA*, 559 F.3d 561 (D.C. Cir. 2009). Ironically, a subsequent dispute between the same parties, not mentioned in OSHA's Opposition, led to a different outcome, in which the D.C. Circuit found that EPA's preamble statements constituted "reviewable final agency action." *NRDC v. EPA*, 571 F.3d 1245, 1252 (D.C. Cir. 2009). In the more recent *NRDC* case, the court held that the agency's preamble statements "represent the consummation of the agency's decisionmaking process and … establish rights and obligations or create binding legal consequences." The court further found that "EPA's statements as to how it will implement the [statutory] requirement are not conjectural and their terms are clear, so it is fair to infer that the EPA intended the statements to create binding legal consequences." Citing *Kennecott Copper Corp. v. Dep't of Interior,* 88 F.3d 1191, 1222-23 (D.C. Cir. 1996) (also cited in Plaintiffs Opening Memorandum, at 12). *See also US Air Tours v. FAA*, 298 F.3d 997, 1039 (D.C. Cir. 2002). To the same effect is *Texas v. United States*, *supra*, 2016 U.S. Dist. LEXIS 113459, at **29-30 (enjoining agency guidance "from which legal consequences will flow").

In the present case, the preamble to the New Rule is not at all equivocal about the Rule's binding effect on incident-based safety incentive programs and routine mandatory post-accident drug testing programs. The preamble explicitly declares:

> **"[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." (emphasis added).

81 FED. REG. at 29,674. Similarly with regard to routine, mandatory post-accident drug testing programs, OSHA declared:

> [T]he final rule **does prohibit employers from using drug testing** (or the threat of drug testing) as a form af adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug 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. *Id*. (emphasis added).

These statements, together with other previously cited agency comments explaining the New Rule, cannot fairly be viewed as "conditional," "equivocal," or "isolated," contrary to the mischaracterizations of OSHA's Opposition. Rather they send a clear message to all covered employers that the New Rule will for the first time prohibit incident-based safety incentive programs and routine, mandatory post-accident testing programs. Despite OSHA counsel's *post hoc* efforts to disclaim the agency's clear language stating the New Rule's binding legal consequences, the preamble is an integral part of the unlawful New Rule. Together they constitute unlawful final agency action that must be set aside.

3. OSHA's Opposition Fails To Justify The "Anti-Safety" Provisions Of The New Rule, Which Remain Arbitrary and Capricious

As explained in Plaintiffs' Opening Memorandum, OSHA's New Rule elevates reporting accuracy over workplace safety, and fails the tests for *Chevron Step II* deference and/or is arbitrary and capricious. (Pl. Mem. at 23-28). Lacking any objective or scientific evidence that the Plaintiffs' safety programs actually impair the accuracy of injury reports, OSHA's Opposition attempts to reverse the burden of proof, claiming that Plaintiffs bear the burden of overcoming a "presumption that the agency's decision is valid." (OSHA Opp. at 27). None of the cases relied on by OSHA involved remotely similar facts or reversals of longstanding policies.

To the contrary, where agencies have reversed course after decades of permitting certain activities, as has occurred here, the Supreme Court has held that the agency is required to examine the relevant data and articulate a satisfactory explanation for its action…." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). Finally, as *Encino Motorcars* reemphasized, OSHA must be "cognizant that its longstanding policies may have engendered serious reliance interests that must be taken into account;" and that "unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." 2016 U.S. LEXIS 3924.

Contrary to OSHA's Opposition, the New Rule fails to meet the foregoing standards. There is no substantial evidence in the Administrative Record that incident-based safety incentive programs or post-accident drug testing programs result in decreased reporting of injuries, as opposed to a decreased number of injuries themselves. Meanwhile, OSHA's Opposition quibbles over Plaintiffs' data showing that Plaintiffs' safety incentive programs make workplaces safer (OSHA Opp. at 31), but OSHA has presented no data to the contrary.[4] It remains undisputed that the number of indemnity claims has fallen dramatically for employers who adopt Plaintiffs' incident-based safety incentive programs. OSHA's Opposition indicates that the agency simply ignored the evidence submitted by Plaintiffs into the Administrative

[4] OSHA nevertheless asserts that Congress "chose accurate recordkeeping as a vital part of ensuring workplace safety." (OSHA Opp. at 31); but Congress has never indicated that recordkeeping should *take priority over safety*, as is the result of the New Rule.

Record, claiming incorrectly that it was entitled to do so because the initial comment period had closed. (OSHA Opp. at 31).[5] This error alone requires that the New Rule be set aside.

As pointed out in Plaintiffs' Opening Memorandum, the record evidence about routine, mandatory post-accident drug testing is similarly conclusive: post-accident drug testing makes workplaces safer and should therefore not be prohibited by OSHA. (Pl. Mem. at 25-27). Outside of OSHA, the federal government agrees that routine, mandatory post-accident testing is not only permitted but may be required. 49 C.F.R. Part 382. In the face of the mountain of evidence that post-accident drug testing makes workplaces safer, OSHA's Opposition repeats that the agency was entitled to narrowly focus on its recordkeeping, regardless of safety concerns. (OSHA Opp. at 32). This cannot be, and is not, what Congress intended when it enacted the OSH Act.[6]

Plaintiffs' Opening Memorandum further noted that OSHA improperly relied on the perceived invasion of privacy from drug testing as a significant reason why such tests should be prohibited. (Pl. Mem. at 27, citing 81 Fed. Reg. at 29673). In response, OSHA's Opposition disclaims such intent, but the preamble's language on the privacy issue speaks for itself and cannot be withdrawn *post hoc* by agency counsel. *See Motor Vehicle Mfrs. Assn.*, 463 U.S. at 50. Giving priority to worker privacy at the expense of worker safety is inconsistent with OSHA's statutory mission and is further ground for an arbitrary and capricious finding. *Id*. at 41-42

[5] Contrary to OSHA's Opposition, at 31, n.27, an agency is not entitled to ignore relevant information that has been received by the Office of Management and Budget (OMB) and included in the Administrative Docket, notwithstanding passage of a comment submission deadline. *See Ad Hoc Metals Coalition v. Whitman,* 227 F. Supp. 2d 134, 140, 141 (D.D.C. 2002) (requiring consideration of relevant post-deadline information received with sufficient time remaining to influence the agency's ultimate decision); *see also* Executive Order No. 12866 (establishing OMB procedures calling for submission of comments to the applicable agency docket so long as they are received before final clearance by OMB). Plaintiffs' comments were timely submitted under these standards. Moreover, they were officially accepted into the record and not rejected, and OSHA was therefore required to consider them.

[6] As Congress stated at the outset of the OSH Act, its intent was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions…." 29 U.S.C. § 651(b).

(holding that agency reliance on factors that Congress did not intend it to consider is ground for a finding of arbitrary and capricious rulemaking).

Finally, OSHA's Opposition does not even attempt to defend the agency's decision to prohibit post-accident drug tests that cannot accurately identify impairment caused by drug use. As shown in Plaintiffs' Memorandum, at 28, NHTSA's peer reviewed panel evaluation of the state of current scientific knowledge for 16 commonly abused drugs confirms that impairment testing is simply not available for the most common workplace drugs. http://www.nhtsa.gov/people/injury/research/job185drugs/technical-page.htm. Therefore, contrary to OSHA's Opposition, the new prohibition against any post-accident drug testing that does not show actual impairment is in effect a blanket prohibition on all post-accident drug testing. This unexplained inconsistency alone requires that the New Rule be vacated as arbitrary and capricious.

4. OSHA Has Failed To Refute The New Rule's Violation Of Section 4(b)(4) Of The Act.

Plaintiffs' Motion further contends that the New Rule violates the plain language of Section 4(b)(4) of the OSH Act, 29 U.S.C. 653(b)(4), which 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. In response, OSHA's Opposition attempts to recast the language of the preamble as saying something other than what appears in the text. (OSHA Opp. at 23). Nothing in the preamble indicates the slightest recognition that state workers compensation laws may encourage post-accident drug testing without requiring it. To the contrary, the only safe harbor offered by OSHA against being found in violation of the new Rule, is if a state law *requirement* is affected. The *post hoc* rationalization of OSHA's counsel

cannot be given any weight on this point, as the agency is bound by what it has stated in the New Rule, not by counsel's wishful description. *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 50.

5. Contrary to OSHA's Opposition, The Agency Failed To Give Adequate Notice Of The New Rule's Anti-Retaliation Provisions.

As argued in Plaintiffs' Opening Memorandum, OSHA nowhere mentioned in its Notice of Proposed Rulemaking ("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, 1080-83 (D.C. Cir. 2009). In response, OSHA's Opposition claims overbroad authority to craft a final rule notwithstanding the absence of any public notice of specific proposals, ignoring the *CSX Transportation* case cited by Plaintiffs which holds the opposite. (OSHA Opp. at 25-26).

In weak support of its notice claim, OSHA cites a reference to one isolated statement by a commenter on the original proposed rule who referred to drug testing. (*Id*. at 26). OSHA is unable to cite even this much "notice" with regard to safety incentive programs and instead relies on a 2012 guidance memo, which was not itself mentioned in the Supplemental Notice and which did not prohibit incident-based safety incentive programs in any event. (*Id*. at 27). This paltry record does not meet the judicial criteria for the "logical outgrowth" test for notice and comment proceedings, and the New Rule must be set aside on this ground as well.

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

Plaintiffs' Opening Memorandum further contended that OSHA violated the Regulatory Flexibility Act, 5 U.S.C. 601 ("RFA"), because OSHA improperly certified that its new anti-retaliation rule would not have significant economic impact on a substantial number of small

entities. (Pl. Mem. at 28-29). OSHA did not even attempt to analyze the impact of its creation of a duplicative, unprecedented administrative litigation procedure for enforcing non-discrimination provisions through inspections, citations and penalties. In response, OSHA offers no defense to its clear failure to comply with the RFA's requirements. OSHA's Opposition simply states that the anti-retaliation provision "add[s] no new rights to employees beyond the requirement that employers inform them of their right to report injuries." (OSHA Opp. at 34). This is no answer at all to the question whether the New Rule will have an adverse impact on employers and constitutes grounds for remand under the RFA. *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161 (D.C. Cir. 2007).

B. Contrary To OSHA's Opposition, Plaintiffs Meet the Remaining Criteria For A Preliminary Injunction

1. OSHA Has Failed To Refute Plaintiffs' Proof Of Irreparable Harm.

In their Opening Memorandum and attached exhibits, Plaintiffs demonstrated that they will be subject to increased inspections, citations, and severe penalties if they fail to comply with the New Rule.[7] Once the New Rule goes into effect, Plaintiffs' only means of avoiding such penalties will be to eliminate or drastically reduce their safety incentive and/or post-accident drug testing programs. As stated under oath in the declarations attached to Plaintiffs' Motion, this will inevitably increase the likelihood of injuries and illnesses in Plaintiffs' workplaces.

In response, OSHA's Opposition first makes the unsupported defense that the Rule merely incorporates an existing prohibition on retaliating against employees identical to that imposed under Section 11(c) of the OSH Act. (OSHA Opp. at 34). This is simply untrue. As noted above and in Plaintiffs' Opening Memorandum, the types of safety programs prohibited by the New Rule have *never* been held to violate Section 11(c). Next, OSHA asserts without any

[7] As noted previously, OSHA's penalties for willful violations recently increased to a maximum of $124,712 per violation, effective August 1, 2016.

support that the New Rule leaves "plenty of room" for employers to change their safety incentive and drug testing programs to comply with the new Rule. This claim is refuted by Plaintiffs' sworn declarations, the only evidence on point in the record, establishing that their safety programs cannot be effective without the provisions that the New Rule prohibits.

OSHA further asserts that Plaintiffs' injury claims are "speculative." (OSHA Opp. at 35). To the contrary, Plaintiffs' have submitted uncontradicted sworn testimony that their programs make their workplaces safer. It must therefore also be true, as Plaintiffs have testified in their declarations, that ending the programs will make their workplaces less safe, causing irreparable harm. *See National Solid Wastes Management v. City of Dallas,* 903 F. Supp. 2 446, 471 (N.D. Tx. 2012); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp.2d 858, 878 (N.D. Tex. 2008). Each of the Plaintiff Declarants states that they or their members/insureds face a Hobson's choice under the New Rule, between confronting increased penalties and inspections or else suffering increased employee injuries and even fatalities in their workplaces. These immediate and likely outcomes, including the loss of employee goodwill attached to the safety programs, constitute irreparable harm justifying injunctive relief.

Also contrary to OSHA's Opposition, numerous courts have held that the increased likelihood of inspections into private workplaces in and of themselves cause irreparable 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)). *See also U.S. Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); *Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819, 821 (5th Cir. 1976).

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

As Plaintiffs have previously argued, 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 that has been in effect for more than forty-five (45) years. OSHA's Opposition offers no evidence that employees will be harmed as a result of this relief. Indeed, OSHA disingenuously claims that its New Rule is merely duplicative of existing 11(c) protections. Though that claim is not true as discussed above, there is no harm in requiring OSHA to continue to adhere to Congress's intended enforcement scheme, as the agency has done for the past 45 years with no discernible adverse effects on injury reporting, until this matter can be decided on the merits.

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

Finally, Plaintiffs have shown that injunctive relief is necessary to protect the public interest. OSHA's Opposition identifies no harm to any public interest other than the supposed viability of the broader recordkeeping rule, which does not take effect until January 1, 2017. (OSHA Opp. at 37). Therefore, no harm will result from delaying the New Rule until at least that date but in any event until the merits of this case are decided.

CONCLUSION – RENEWED REQUEST FOR HEARING

For the reasons stated in their Complaint, in their Emergency Motion, and in this Reply, Plaintiffs pray that the status quo be preserved and that Defendants be preliminarily enjoined from implementing and enforcing OSHA's New Rule provisions on or before the planned November 1 effective date. The injunction should be effective in any jurisdiction where Plaintiffs are located, *i.e.*, nationally. *See Nat'l Fed'n of Ind. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694, at *128. Plaintiffs further renew their request for a hearing on their emergency motion on an expedited basis, inasmuch as this case raises issues of great importance to millions of employers and employees across the country.

Dated: September 2, 2016

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 2nd day of September, 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