

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**NATIONAL ASSOCIATION OF
HOME BUILDERS OF THE
UNITED STATES, *et al.*,**

PLAINTIFFS,

v.

**R. ALEXANDER ACOSTA,
SECRETARY OF LABOR, in his
official capacity, *et al.*,**

DEFENDANTS.

Case No. 5:17-cv-0009-R

**JOINT MOTION AND MEMORANDUM IN SUPPORT
TO LIFT STAY AND SET SCHEDULE**

By this Motion, Plaintiffs National Association of Home Builders of the United States, Chamber of Commerce of the United States of America, Oklahoma State Home Builders Association, State Chamber of Oklahoma, National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association (the “Plaintiffs”) and Defendants R. Alexander Acosta, Loren E. Sweatt,¹ the U.S. Department of Labor, and the Occupational Safety and Health Administration (“Defendants”) respectfully ask the Court to lift the stay currently in place since July 11, 2017 in this case and set a schedule for further proceedings. In support of this Motion, the parties state:

1. Plaintiffs commenced this action on January 4, 2017 challenging a 2016 Occupational Safety and Health Administration (“OSHA”) rule that, among other things,

¹ Loren E. Sweatt, the Acting Assistant Secretary of Labor for Occupational Safety and Health, has been substituted as a defendant in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

requires certain employers to submit injury and illness data electronically, requires employers to establish reasonable reporting procedures, and establishes an administrative mechanism for OSHA to issue citations to employers for actions that allegedly retaliate against employees for reporting injuries and illnesses. *See* ECF No. 1; *see generally* 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) (the “2016 Rule”).

2. On March 22, 2017, Defendants filed a Motion to Stay Proceedings for 60 Days so that incoming leadership personnel at the United States Department of Labor would have adequate time to consider the issues raised in the case. *See* ECF No. 49. Plaintiffs consented to this motion. *See* ECF No. 53. On April 5, 2017, this Court granted Defendants’ motion, staying all deadlines for 60 days. *See* ECF No. 60.

3. On June 28, 2017, OSHA published a Notice of Proposed Rulemaking (“NPRM”) that addressed the deadline for submitting initial rounds of electronic data as well as the question of whether additional portions of the 2016 Rule would be subject to revisions. *See* Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,261-01 (June 28, 2017).

4. In July 2017, the parties indicated that OSHA was “still considering whether to go through rulemaking to make additional changes to the Rule.” ECF No. 65 at 2.

5. In light of OSHA’s June 28, 2017 NPRM and ongoing considerations whether to conduct additional rulemaking, on July 10, 2017, the Defendants filed another Motion to Stay Proceedings, asking that the lawsuit be stayed so that OSHA could

determine whether to reconsider, revise, or remove portions of the 2016 Rule at issue in this case. *See* ECF No. 71. Plaintiffs did not oppose this request. On July 11, 2017, this Court granted the Defendants’ motion and required that the Defendants submit a status report every 90 days updating the Court as to OSHA’s progress with respect to the proposed rulemaking. *See* ECF No. 72.

6. On January 25, 2019, OSHA published a revised final rule (the “2019 Rule”) that removed requirements – originally put forth in the 2016 Rule – for certain employers to submit the data on OSHA Forms 300 and 301 electronically to OSHA. The 2019 Rule also added a new requirement that employers who submit their 300A data electronically must also include their Employer Identification Number (“EIN”) in the submission. *See* Tracking of Workplace Injuries and Illnesses, 84 Fed. Reg. 380 (Jan. 25, 2019).

7. As a result of the 2019 Rule, certain causes of action raised by Plaintiffs in this case have become moot. However, the 2019 Rule did not address other causes of action raised by Plaintiffs and thus the parties agree that those causes of action may go forward at this time. The parties respectfully request that this Court lift the stay on proceedings so that this lawsuit may proceed. Plaintiffs intend to file a First Amended Complaint reflecting the recent changes made to the 2016 Rule.

8. In the event that this Court lifts the stay, the parties respectfully request the following revised deadlines for the case:

Plaintiffs to File Amended
Complaint.....

April 1, 2019

Defendants to File Certified List of the Contents of the Administrative Record ²	May 1, 2019
Plaintiffs' Motion for Summary Judgment.....	May 17, 2019
Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment.....	June 17, 2019
Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment and Reply to Defendants Opposition to Plaintiffs' Motion for Summary Judgment.....	July 1, 2019
Defendants' Reply to Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment.....	July 15, 2019
Defendants to File Answer to Amended Complaint.....	14 days after resolution of any motions for summary judgment ³

RELIEF REQUESTED

WHEREFORE, the parties respectfully move the Court for an Order lifting the stay on proceedings currently in place and setting the parties' proposed litigation schedule.

² The parties would file all administrative record documents cited in any summary judgment briefs as exhibits to those briefs.

³ The Court previously extended the deadline for Defendants to file an answer to the Complaint to fourteen days after the resolution of any forthcoming dispositive motions. *See* ECF No. 38.

Dated: March 19, 2019

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 19, 2019, a true, correct, and exact copy of the foregoing document was served via electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

/s/ Bradford T. Hammock
Bradford Hammock (*Pro Hac*)