UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 18-1729 (TJK)
v.	)	
PATRICK PIZZELLA, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF SUMMARY JUDGMENT

Plaintiffs submit this supplemental memorandum in response to the Court's order of August 1, 2019, asking the parties to address the effect on this case—if any—of OSHA's 2019 rule, entitled "Tracking of Workplace Injuries and Illnesses," 84 Fed. Reg. 380 (Jan. 25, 2019) (the Rollback Rule), that rescinded provisions of OSHA's 2016 rule, entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) (the Electronic Reporting Rule), that required covered establishments to electronically submit information from OSHA Forms 300 and 301. S*ee* Order, ECF No. 33. This case challenges OSHA's May 2018 suspension—without notice and comment and without a reasoned explanation—of the Electronic Reporting Rule's requirement that covered employers submit their 2017 Form 300 and 301 data by July 2018 (the Suspension Rule). In denying defendants' motion to dismiss, this Court held that the Suspension Rule was substantive rulemaking subject to the APA. *See Pub. Citizen Health Research Grp. v. Acosta* (*PC HRG*), 363 F. Supp. 3d 1, 18–19 (D.D.C. 2018). The Court also denied plaintiffs' motion for a preliminary injunction on the ground that plaintiffs had not demonstrated a likelihood of *irreparable* harm because, if "Plaintiffs are successful on the merits

of their claims, the Court may still declare the earlier suspension of the Rule unlawful, require OSHA to recognize the July 2018 submission deadline, and give Plaintiffs the relief they seek—data that employers should have been required to submit to OSHA by July 2018." *Id.* at 21. Addressing specifically the possibility that OSHA would issue the Rollback Rule and rescind the submission requirement, the Court held that plaintiffs could still obtain relief for any harm caused by the May 2018 suspension because "permanently rescinding the Rule *after* that compliance deadline passed and the obligations of covered employers were allegedly unlawfully postponed" would "not affect any alleged harm caused to Plaintiffs by [OSHA]'s original suspension of the July 2018 deadline—loss of access to data employers were required to submit by that date." *Id.*

The Court's recognition that rescission of future reporting requirements would not bar the Court from granting relief was correct. The 2019 Rollback Rule is not retroactive; thus, it does not supersede the 2018 Suspension Rule and the Court retains the authority to grant effective relief to plaintiffs. Because plaintiffs' claims are not moot, because OSHA has conceded liability by failing to offer a defense on the merits, and for the reasons explained in plaintiffs' summary judgment memoranda, the Court should promptly grant summary judgment to plaintiffs.

ARGUMENT

As the Court's August 1 Order suggests, this case is moot only if the 2019 Rollback Rule rescinded the reporting requirement for Forms 300 and 301 for both future years *and* for July 2018. If the 2019 Rollback Rule did not rescind the July 2018 submission requirement, it does not moot this case because the Suspension Rule remains in effect. Thus, the Court's question turns on whether the 2019 Rollback Rule is only forward looking or is also retroactive.

A. "It is well settled that an agency may not promulgate a retroactive rule absent express congressional authorization." *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C. Cir. 2011) (citing

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)). "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen*, 488 U.S. at 208. This principle applies both to new rules and to changes to existing rules. *Id*. at 13–14 (citing *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)); *see also* 5 U.S.C. § 551(5) (providing that rulemaking "means agency process for formulating, amending, or repealing a rule").

A retroactive rule is one that alters the past legal consequences of past actions, as opposed to altering only the "future effect" of past actions. *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). "Put differently, '[i]f a new rule is 'substantively inconsistent' with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively.'" *Ne. Hosp. Corp.*, 657 F.3d at 14 (quoting *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010)). "Retroactivity is not favored in the law," and rules "will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

Here, OSHA's 2019 Rollback Rule does not purport to have retroactive effect on the July 2018 submission requirement: The Rollback Rule's effective date was February 25, 2019. 84 Fed. Reg. 380 (Jan. 25, 2019). In issuing the Rollback Rule, OSHA addressed the 2018 submission deadline only by stating that it would not enforce that deadline without first giving notice. *Id.* at 382. Likewise, OSHA's papers in this case do not suggest that Congress has authorized it to issue retroactive rules. To the contrary, OSHA argues that, if the 2019 Rollback Rule is held to be lawful, the question whether to enforce the 2018 submission requirement "will turn on the equities." Defs. Opp. 11, ECF No. 26.

Because the Rollback Rule is not retroactive—that is, does not alter or even purport to alter the law as it existed prior to its issuance in January 2019—this case is not moot. Plaintiffs have not obtained the relief they seek: The 2018 Suspension Rule remains in effect, and OSHA has not called for submission of the Form 300 and 301 data that was due on or before July 1, 2018. And intervening events do not make it impossible to grant effective relief to plaintiffs: The Court can "still declare the earlier suspension of the Rule unlawful, require OSHA to recognize the July 2018 submission deadlines, and give Plaintiffs the relief they seek—data that employers should have been required to submit to OSHA by July 2018." *PC HRG*, 363 F. Supp. 3d at 21.

B. This case is unlike those cited in the Court's August 2019 order. In *Clean Water Action v. Pruitt*, 315 F. Supp. 3d 72, 86 (D.D.C. 2018), the plaintiffs challenged an indefinite stay of a final rule, asking the court "to declare the Stay unlawful and vacate it." While the case was pending, the agency undertook notice-and-comment rulemaking to amend the stayed rule and, in issuing the final rule, stated with respect to the stay that it "hereby, withdraws that action." *Id.* Because the plaintiffs in *Clean Water Action* challenged only the indefinite stay and "the stay was withdrawn, there [was] nothing for the Court to vacate, and a declaratory judgment would be an impermissible advisory opinion." *Id.* Here, OSHA did not withdraw the Suspension Rule, and the Rollback Rule neither reinstated nor retroactively abolished the July 2018 deadline. Indeed, OSHA agrees that the Suspension Rule remains in effect and argues only that "the equities counsel against" granting plaintiffs the relief they seek. *See* Defs. Opp. 12.

Center for Science in the Public Interest v. Regan, 727 F.2d 1161 (D.C. Cir. 1984), also cited in the August 1 Order, involved a Treasury Department rule concerning alcohol labeling. Before the rule's effective date, the Department undertook a new notice-and-comment rulemaking to rescind it. The plaintiff challenged the rescission rule and won—the district court held that the

rescission rule was invalid because the agency had not provided an adequate explanation and had given undue weight to cost. *Id.* at 1163. The court ordered the agency to set a new effective date for the original rule and the Department did so. A defendant-intervenor appealed the decision on the merits, and the Department appealed only as to the propriety of the relief ordered. *Id.* While the appeals were pending, the Department undertook a new rulemaking and promulgated a new labeling rule that superseded the rescission rule. *Id.* The court of appeals then held that because the subject matter of the appeals—the rescission rule—was no longer operative, "the controversy surrounding it ha[d] been mooted" and "[a]ny further pronouncement on [the rescission rule] would be purely advisory." *Id*. at 1164.

In contrast, here, the Suspension Rule is still operative because the Rollback Rule does not apply retroactively. Rather, the Rollback Rule had an effective date of February 25, 2019, and is only forward looking. *See supra*. Thus, this case is not moot because there remains a live controversy between adverse parties as to the validity of a rule that continues to exist and have legal effect. This Court's decision regarding the validity of the Suspension Rule will not be advisory. Rather, if the Court finds that the Suspension Rule was issued in violation of the APA, the Court can order effective relief by requiring OSHA to collect the 2017 Form 300 and 301 data. *PC HRG*, 363 F. Supp. 3d at 21. OSHA's papers do not argue otherwise. OSHA does not argue that the Court *cannot* provide effective relief to plaintiffs, but instead that the Court should decline to do so because of "equities." Defs. Opp. 11.

NRDC v. Nuclear Regulatory Commission, 680 F.2d 810 (D.C. Cir. 1982), is likewise inapposite. There, the plaintiff challenged both issuance of a rule without notice-and-comment rulemaking and application of the rule in an ongoing adjudicatory proceeding. *Id.* at 811. The agency repromulgated the challenged rule after notice-and-comment rulemaking, including a

section specifically making it applicable to ongoing proceedings. *Id.* at 813. The court held that plaintiff's procedural challenge was moot, and that its challenge to the application of the rule was not reviewable until the agency entered a final order in the proceeding. As to the procedural challenge, the court explained that "[e]ven if this attack was originally well-founded, we can hardly order the [agency] at this point to do something that it has already done. As to this issue, [plaintiff] has obtained everything that it could recover by a judgment of this court in its favor." *Id.* at 814 (quotation marks and citation omitted).

Here, by contrast, OSHA has not repromulgated the Suspension Rule after undertaking the procedures required by the APA, and plaintiffs have not obtained any of the relief to which they are entitled. Rather, the Suspension Rule remains in effect and is the only agency action impeding plaintiffs' access to the 2017 Form 300 and 301 data. Despite its assertion to the contrary, OSHA cannot cure the defects in the 2018 Suspension Rule by doing notice-and-comment rulemaking for *a different rule*—the 2019 Rollback Rule. *See* Defs. Opp. 13 (asserting that "OSHA has, in essence, cured the violation"). The Rollback Rule does not address whether OSHA should collect the 2017 data that, absent the unlawful Suspension Rule, would have been submitted by July 1, 2018. Thus, the Rollback Rule does not supersede the Suspension Rule.

CONCLUSION

Plaintiffs' claims are not moot because the Suspension Rule remains operative, and the Court can order effective relief, as the Court correctly recognized in *PC HRG*, 363 F. Supp. 3d at 21. The Court should grant summary judgment for plaintiffs and order defendants promptly to notify covered employers that they must electronically submit the OSHA Form 300 and 301 data that the Electronic Reporting Rule required employers to submit by July 2018.

Dated: September 4, 2019

Respectfully submitted,

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