Kapoor and Keller for Law360: Managing OSHA Mental Illness Logs After Fifth Circuit Vacatur

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In a recent article for *Law360*, Haynes Boone Partner **Mini Kapoor, Ph.D.** and Associate **Jonathan Keller** examine the Fifth Circuit's decision striking down OSHA's mental health recordkeeping rule and the implications for employers.

Kapoor and Keller discuss the court's conclusion that the Occupational Safety and Health Act does not authorize OSHA to require employers to record work-related mental illnesses on OSHA logs, resulting in the vacatur of the agency's mental illness recordkeeping rule.

They also explore how the ruling reflects the broader post-*Loper Bright* trend of heightened judicial scrutiny of administrative agency authority and outline key considerations for employers operating within and outside the Fifth Circuit.

Read the full article below and on *Law360* **here**.

Managing OSHA Mental Illness Logs After Fifth Circuit Vacatur

For years, employers have logged work-related mental illnesses on their OSHA 300 Logs. The U.S. Court of Appeals for the Fifth Circuit has now held that the Occupational Safety and Health Administration never had the authority to require such recordkeeping.

In a unanimous July 21 decision in Exxon Mobil Corp. v. Occupational Safety & Health Review Commission, the panel ruled that the Occupational Safety and Health Act does not authorize OSHA to require that employers record employees' work-related mental illnesses.[1] The court vacated Section 1904.5(b)(2)(ix) of Title 29 of the Code of Federal Regulations, and set aside a recordkeeping citation issued to Exxon that it declined to log an employee's alleged work-related post-traumatic stress disorder.

The opinion may be viewed as a significant application of Loper Bright analysis to OSHA's regulations.

How the Case Reached the Fifth Circuit

In December 2021, a component pipe ruptured during repairs to a hydro-desulfurization unit at a Texas refinery. The resulting hydrocarbon release produced a large explosion and an eight-hour fire.

A process-technician employee who had worked at the facility since 2008 was in a truck a quarter mile away when the unit exploded. He saw flames rising more than 150 feet and drove toward them. Although not a member of the employer's emergency response team, he volunteered to enter the burning unit twice with facility firefighters to guide them to valves feeding the fire.

In the months after the fire, the technician sought treatment and received a series of post-traumatic stress disorder diagnoses. Two licensed clinical social workers at the same clinic and his primary care physician each attributed the condition to the fire.

Applying the regulation's requirement that the diagnosing provider have "appropriate training and experience," the employer determined that none of the three qualified and informed the employee of that conclusion. He then saw a psychologist located through the employer's employee assistance program portal, who diagnosed work-related PTSD and recommended six more months out of work.

The employer agreed that the psychologist was qualified but invoked the second-opinion option and asked the employee to see its designated provider. The employee declined, taking the position that the psychologist had provided the second opinion.

But the employer submitted the records to its designated provider — for a second opinion. The provider concluded on a records review that the employee did not have work-related PTSD. Accordingly, the employer did not record the case in its OSHA logs.

The union reported the employer's decision to OSHA, which cited the employer in June 2022 for an other-than-serious recordkeeping violation. After a four-day hearing, an administrative law judge dismissed items involving two other employees diagnosed with PTSD — one because the diagnosing provider was not qualified, one because the diagnosis was not shown to be work-related — but affirmed the item concerning the process technician and assessed a $691 penalty. When the Occupational Safety and Health Review Commission declined review, the employer petitioned the Fifth Circuit challenging OSHA's authority to adopt the rule.[2]

The Court's Statutory Analysis

The panel framed the appeal as a "pedestrian question of statutory interpretation" and answered it by applying the tools offered by the U.S. Supreme Court's 2024 decision in Loper Bright Enterprises v. Raimondo. Among other things, the court noted that agencies are creatures of statute and must point to explicit congressional authority. Further, a reviewing court exercises independent judgment, polices the outer boundaries of any delegation and identifies the best reading of the statute. A merely permissible reading no longer suffices.

Section 8(c)(2) of the Occupational Safety and Health Act directs the secretary of labor to require records of "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, restriction of work or motion, or transfer to another job."

The act does not define "illnesses." The word could plausibly reach mental conditions, the court found, but context cut the other way. Under the canon of noscitur a socias, the rule of interpretation meaning "a word may be known by the company it keeps," Congress conjoined "injuries" and "illnesses" and separated both from "deaths," so the two should be read alike.

The carveout for minor injuries, with no parallel reference to minor illnesses, suggested to the panel a single category. Similarly, the excluded criteria — first aid, loss of consciousness, restriction of work or motion — most naturally describe physical harm, as does OSHA's own description of first aid: cleaning cuts, treating minor burns and draining blisters.

The court pointed to the surrounding provisions of the Occupational Safety and Health Act recordkeeping framework to support its conclusion. Subsection (c)(1) ties recordkeeping to occupational accidents and illnesses, subsection (c)(3) addresses toxic materials and harmful physical agents, and Section 8(a)'s inspection authority enumerates structures, machines, devices, equipment and materials — all sources of physical risk.

The panel also considered contemporaneous dictionary definitions of "illness," citing 1968-1970 editions of Black's Law Dictionary, Ballentine's Law Dictionary, The Random House Dictionary of the English Language and Webster's Second New International Dictionary. Those sources defined "illness" in terms of disease, sickness and ailment.

OSHA's lone supporting source, Webster's Third's definition of "illness" as "unhealthy condition of body or mind," drew a rebuke from the panel, which cited Justice Antonin Scalia's observation in the Supreme Court's 1994 decision in International MCI Telecommunications Corp. v. AT&T that the edition portrayed "common error as proper usage." The court also rejected OSHA's extratextual arguments, noting that legislative history "is not law" and that the act's general purpose cannot enlarge a specific delegation.

Having resolved the authority question, the panel did not reach the employer's alternative Administrative Procedure Act and due process arguments.

The Reach of the Vacatur

The panel's statutory holding binds the Fifth Circuit — Texas, Louisiana and Mississippi. For now, the judgment binds only the circuit, and the provision likely remains enforceable elsewhere.[3]

Employers with facilities in multiple states may want to weigh their current recordkeeping procedures for mental illness cases in consultation with environment, health and safety professionals. Excluding those cases in the three Fifth Circuit states while recording them elsewhere could affect both companywide DART rates and the consistency of the logs across facilities.

DART rates are calculated establishment by establishment, but those establishment figures feed OSHA's site-specific targeting program, which measures them against U.S. Bureau of Labor Statistics industry averages, and they are also aggregated for company-level reporting and contractor prequalification.

If an employer records a mental illness case at a facility outside the Fifth Circuit but does not record a comparable case at a Fifth Circuit facility, the two establishments may report different DART rates for the same type of event — an inconsistency that could draw questions during audits or contractor prequalification reviews. A lower rate is not necessarily the safer position. The targeting program also samples establishments that are reporting rates well below industry averages to verify the accuracy of their Form 300A data.

To preserve comparability, employers may consider maintaining a parallel internal record of mental illness cases at Fifth Circuit facilities, even if those cases no longer appear on the OSHA 300 log, including for internal benchmarking and insurance purposes. Employers may also consider documenting the legal basis for the change in recordkeeping practice, and identifying when and where the revised practice applies, so that any DART-rate discrepancy can be explained.

Employers should also consider the impact of the Fifth Circuit's decision on pending inspections, citations and contests involving mental health diagnoses. Employers with open recordkeeping citations for mental illness entries may evaluate whether the decision supports contesting the citation or seeking its withdrawal. A citation becomes a final order unless the employer files a notice of contest with the OSHA area director within 15 working days of receipt, and requesting an informal conference does not extend that deadline, so employers should be mindful of these deadlines.

Where a case has already been heard, a party adversely affected by an administrative law judge's decision may file a petition for discretionary review with the commission no later than 20 days after the decision is docketed. Employers in informal settlement discussions with OSHA area offices over mental illness recordkeeping citations may now have additional leverage to negotiate withdrawal. Employers may also review any pending abatement obligations tied to mental illness recordkeeping and assess whether compliance remains legally required.

Outside the Fifth Circuit, employers should be prepared for the possibility that OSHA will continue to enforce the provision, and may want to preserve documentation supporting each recordability and nonrecordability determination.

What the Decision Does Not Touch

Employers should note that the Fifth Circuit ruling is limited to mental illness cases and does not otherwise affect recordkeeping obligations.

The ruling does not appear to affect any state OSHA plans. Employers in states with OSHA-approved state plans should monitor and comply with the state-specific requirements for recording mental illness cases. Employers should note that states with OSHA plans may also independently impose mental health recordkeeping obligations unaffected by this ruling.

Nothing in the opinion counsels retreat from employee assistance programs, critical incident response, peer support or trauma-informed follow-up after a serious event. Employers should consider continuing with such programs. Indeed, the court called OSHA's underlying objective commendable — its disagreement was with the source of the agency's authority, not with the seriousness of workplace mental health.

Looking Ahead

The government has 45 days from the entry of judgment to seek a panel rehearing or rehearing en banc, and 90 days from entry of judgment or from denial of a timely rehearing petition to petition for certiorari at the Supreme Court.

OSHA, for its part, could issue enforcement guidance clarifying how it will treat the vacated rule. OSHA could also attempt new rulemaking for recordkeeping of mental illnesses.

Regardless of these potential developments, employers could view the Fifth Circuit decision as an illustration of how courts may apply Loper Bright in cases challenging OSHA regulations.

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[1] Exxon Mobil Corp. v. Occupational Safety & Health Review Commission, No. 25-60108 (5th Cir. July 21, 2026).

[2] The incident facts described in this article are based on the narration in the court's decision.

*[3] Note that the Fifth Circuit has recently said that setting aside agency action under Administrative Procedure Act vacatur "has nationwide effect, is not party-restricted, and affects persons in all judicial districts equally." See, e.g., In re: Clarke, 94 F.4th 502, 512 (5th Cir. 2024). The court in this case did not vacate the rule under the APA, however, concluding that because Section 657(c)(2) did not authorize the mental-illness rule, it did not need to reach the APA alternative claim. Note, too, that the Supreme Court has never endorsed universal vacatur — it expressly reserved the question in Trump v. CASA Inc., 606 U.S. 831, n.10 (2025) — and agencies have occasionally treated an adverse vacatur as binding only in the deciding circuit, as the Environmental Protection Agency did after the Eighth Circuit vacated two of its rules in Iowa League of Cities v. Env't Prot. Agency, No. 11-3412, 2021 WL 6102534, at *1 (8th Cir. Dec. 22, 2021).*