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Court: Employers Can't Stall Subpoenas to Run out OSHA's Enforcement Clock

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Employers consider many factors when choosing whether to challenge investigatory subpoenas. They now have an additional consideration: whether a court might grant the Occupational Safety and Health Administration (OSHA) more time to issue a citation if the employer challenges a subpoena. So said the U.S. District Court for the Western District of Texas in *Secretary of Labor v. Ben E. Keith Company*, No. SA-19-CV-527-XR (June 18, 2019).

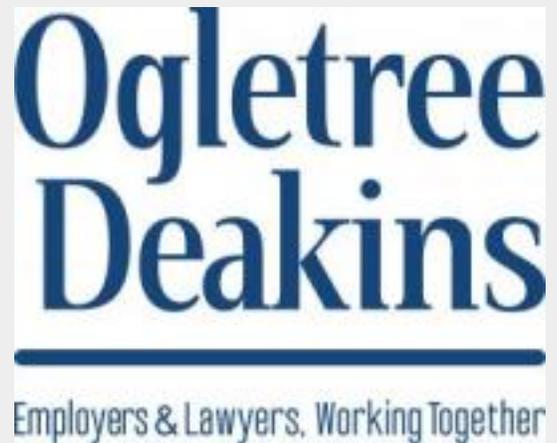
In the case, the court granted OSHA's petition to enforce a subpoena for documents even though the subject location had recently been closed. That it was now closed, the court held, was irrelevant.

Here is where it gets interesting. Normally, OSHA would have had six months after the "occurrence of any violation" to issue a citation under section 9(c) of the Occupational Safety and Health Act. But the court held that it can—and will—use the concept of equitable tolling to stop the running of the statute of limitations, thereby giving OSHA additional time within which to issue a citation. The court cited *Acosta v. Quality Construction, Inc.*, which broadly held that "the equitable tolling doctrine is read into every federal statute of limitations, and the decision whether the doctrine should be applied lies within the sole discretion of the court." The *Quality Construction* court's rationale for tolling the statute of limitations was that "any other conclusion would allow [the employer] to defeat a potentially meritorious action by refusing to comply with a valid subpoena."

In deciding whether to challenge an investigatory subpoena going forward, employers should keep in mind that a potential consequence could be that a court may give OSHA more time to issue a citation. Presumably, other federal enforcement agencies could cite *Ben E. Keith Company* to seek equitable tolling of other enforcement deadlines as well.

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