

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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In re: American Federation of	)	
Labor and Congress of Industrial	)	
Organizations and United Food	)	
and Commercial Workers	)	No. 07-1001
International Union,	)	ORAL ARGUMENT NOT
	)	SET
Petitioners	)	

**MOTION OF THE SECRETARY OF LABOR TO HOLD CASE IN  
ABEYANCE<sup>1</sup>**

Respondent Secretary, United States Department of Labor, through her attorneys, hereby moves the Court to hold this case in abeyance pending final publication in November 2007 of a personal protective equipment payment rule. Counsel for the Secretary has contacted counsel for petitioners pursuant to Circuit Rule 27(h)(2). Petitioners will be filing a response shortly. As grounds for her motion, the Secretary states as follows:

1. In March, 1999, the Secretary of Labor proposed a rule requiring employers to provide and pay for all necessary personal protective equipment (PPE) with certain exceptions relating to eye

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<sup>1</sup> This motion also should be considered under Circuit Rule 27(h) as a request for extension of time to file the Secretary's response brief,

and footwear. 64 Fed. Reg. 15402, 15414-15 (March 31, 1999).

The American Federation of Labor and Congress of Industrial Organizations and the United Food and Commercial Workers International Unions have filed a petition for mandamus to compel the Secretary to issue a final rule.

2. The Secretary is moving forward with the PPE payment rulemaking. The Secretary has carefully reviewed the regulatory schedule and has determined that absent unforeseen circumstances, she will publish a final PPE payment rule in November 2007.<sup>2</sup>

3. A writ of mandamus is a “drastic and extraordinary remedy reserved for really extraordinary causes.” *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (internal quotations and citations omitted). Judicial caution should be exercised especially when encroaching upon the prerogatives of the executive branch. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (“equitable relief, particularly mandamus, does not

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due March 19, 2007.

<sup>2</sup> The Secretary will promptly inform the Court and petitioners if it appears she will be unable to meet the November date.

necessarily follow a finding of a violation: respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of [regulatory] priorities”).

4. In view of the Secretary's commitment to issue the PPE payment rule in a short time, it is unnecessary to consider petitioners' request. The Court should therefore hold the case in abeyance pending publication of the final rule in November 2007. *See Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (mandamus not warranted where agency was moving with dispatch); *Oil, Chemical & Atomic Workers Intern. v. Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (no court order needed where agency was completing rulemaking in reasonable time).

WHEREFORE, the Secretary requests that the Court hold the case in abeyance pending publication of a final PPE payment rule in November, 2007.

Respectfully submitted.

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MARCH 2007

## **CERTIFICATE OF PARTIES**

The parties to the instant action, which invokes this Court's original jurisdiction, are:

The American Federation of Labor and Congress of Industrial Organizations

The United Food and Commercial Workers International Unions

Secretary, United States Department of Labor

The following have moved to participate as *amici curiae*:

United States Chamber of Commerce

National Association of Manufacturers

American Trucking Association

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Gary K. Stearman

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of March 2007, I served by regular mail, postage prepaid a copy of the foregoing motion to hold case in abeyance upon:

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