August 2019 Regulatory Update

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Regulatory Reform

Recent Developments. On May 21, 2019, EPA Administrator Wheeler announced that he was directing the agency to initiate rulemakings that will ensure that "the agency balances benefits and costs in regulatory decision-making." Although the agency has long been required to complete cost/benefit analyses for rulemakings per prior Presidential Orders, this initiative will formalize such analysis with binding and judicially enforceable regulations. Wheeler has directed the heads of each office – air, water, solid waste, and chemical safety – to develop a media-specific notice-and-comment rulemaking on how benefit-cost balancing and analytical best practices will be applied under each statute, starting with the air office, which will propose a regulation "later this year."

Plywood and Composite Wood Products MACT

Recent Developments. SLMA and its industry partners have been informed by EPA that the agency will bifurcate its ongoing MACT rulemaking and its RTR (Risk and Technology Review) as only the RTR is subject to a Court-ordered deadline of June 2020. EPA is concerned that it will not be able to complete either task by the deadline unless it cuts back on its effort to work on the MACT.

Due to the significant progress that has been made with EPA on the MACT front over the last year, SLMA is concerned that the bifurcation of these issues could result in the delay of the MACT rulemaking until after the 2020 elections. To date, SLMA and the industry coalition have been engaging with EPA to discuss work practice standards that are flexible and reasonable for major source lumber products.

"Once In, Always In" Policy

Recent Developments. On June 26, 2019, EPA finalized a proposed rule for the formal adoption of EPA's January 25, 2018 memoranda directed at the reversal of EPA's prior "once in, always in" policy. This policy prevented major hazardous air pollutant ("HAP") sources from *ever* being considered a minor/area source even if such source reduced their HAP emissions below major source levels. EPA's new position would allow a major source to reduce its emissions below major source levels. EPA's new position would allow a major source to reduce its emissions below the significant threshold and then opt out of the Title V permitting process (with respect to HAPs) and other programs directed at major sources only. EPA will accept comments on the Proposed Rule for 60 days after its publication in the Federal Register. We will continue to monitor this issue.

Climate Change Regulation

Recent Developments. On June 19, 2019, EPA issued a final rule that both repeals the Obama era Clean Power Plan and replaces it with the Affordable Clean Energy Rule (ACE). The former Clean Power Plan strictly limited potential greenhouse gas emissions from newly constructed *coal-fired* power plants. Interestingly, there are no current plans to build any new coal -fired power plants in the U.S. at this time.

Importantly, the final ACE does *not* list biomass as a compliance option for new coal-fired power plants. EPA explains that because the activities involved with the procurement of biomass are not under the control of the power plant operators, the facility cannot ensure that the biomass is "cleaner" than coal.

The ACE is expected to be challenged in court by numerous States and public interest groups.

Biogenic Carbon Emissions

Recent Developments. None. February 14, 2019, the house passed the FY19 Appropriations Bill. Among other things, the Bill emphasized the key role that forests can play in addressing the energy needs of the United States. The Bill directed the DOE, DOA and US EPA to ensure that Federal policy relating to forest bioenergy is consistent across all Federal departments and agencies and recognizes the full benefits of the use of forest biomass for energy, conservation, and responsible forest management. The Bill also directed the agencies to establish clear and

simple policies for the use of forest biomass as an energy solution, including policies that reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source.

On November 1, 2018, the US EPA, Department of Agriculture and Department of Interior sent a joint letter to Congress to update them on the agencies' progress for the implementation of the carbon neutrality legislation that was enacted in the Consolidated Appropriations Act of 2018 (H.R. 1625). The letter pledges that the three agencies will continue to work together to "ensure consistent federal policy on forest biomass energy and promote policies that support the treatment of forest biomass as a carbon-neutral renewable energy solution."

See also above for developments on this issue as it relates to the proposed Affordable Clean Energy Rule.

Proposed SSM SIP Call Rule

Recent Developments. Although the litigation continues to be stayed indefinitely (see below), EPA has recently taken a couple of actions that could indicate a willingness to abandon the previously issued 2015 SSM Rule. EPA Region 4 recently announced its plans to approve a NC June 2017 SIP revision regarding NOx emissions from engines. At the same time, EPA is inviting comment on an alternative SSM policy that moves away from the interpretations in the 2015 SSM SIP Call. EPA is revisiting the question of whether the lack of "continuous controls" or standards leads to NAAQS violations during SSM events or if other Clean Air Act programs are sufficiently protective to avoid air quality degradation and non-attainment during such periods. The notice also notes that the original SSM court decision applies only to MACT and not the criteria pollutant or SIP side of the air program. The notice foreshadows that if this alternative interpretation is adopted then it would not find the NC SIP inadequate as it did in the 2015 SIP Call. Comments are due in late July.

On April 24, 2017, the D.C. Circuit granted EPA's request to *indefinitely* delay oral arguments, which had previously been scheduled to begin on May 8th, regarding the pending challenges to the SSM Rule. This move may indicate that EPA is planning to reconsider the Rule internally.

Background. November 22, 2016 marked the deadline for states to complete their SIP revisions in response to the final rule. There was a variety of state responses with many states choosing to accept EPA's proposed language and others delaying their actions until completion of the litigation. Briefing has been completed in the litigation filed by a broad coalition of industry, states, and state agencies asking the D.C. Circuit to strike down the SSM Rule.

Boiler MACT Rulemaking/ Litigation

Recent Developments. None. On July 3, 2018, the D.C. Circuit denied the Sierra Club's request for the Panel Rehearing (discussed below).

In addition, SLMA continues to work with its industry partners on the portions of the Rule that were remanded to the agency on March 19, 2018. The industry group met with EPA recently to discuss potential fixes to the Rule. On March 19, 2018, the DC Circuit issued its decision on the pending challenges to the "reconsideration rule." This case involves a challenge to EPA's decisions to amend the major source rule by (a) setting a minimum MACT floor of 130 ppm for CO as a surrogate for organic HAP emissions and (b) establishing and clarifying work practice standards during startup and shutdown periods. The DC Circuit upheld the portion of the rule relating to startup and shutdown periods but reversed and remanded to EPA the surrogate-CO standard for further clarification and justification. SLMA will work with its industry partners to help EPA finalize this standard.

NHSM Rulemaking/ Litigation

Recent Developments. None. On December 7, 2018, an industry coalition submitted a petition to the EPA requesting that it remove restrictions under the Non-Hazardous Secondary Materials (NHSM) rule, based on contaminant comparison criteria that are incompatible with recent court decisions. The Petition specifically asks for the removal of the "designed to burn" designation for creosote treated ties. The coalition believes that removal of the mandatory contaminant comparison criteria will result in the removal of the "percentage to burn" combustion

limitation and date of construction restriction. Importantly, removal of the comparison criteria will allow more treated wood biomass to be categorically listed as boiler fuels.

On May 30, 2018, the EPA announced final rule changes to the definition of "Solid Waste" under the Resource Conservation and Recovery Act. The change vacates one of the criteria under which EPA uses to determine what materials fall under the definition of solid waste. EPA uses the same criteria for the NHSM rule, used to determine whether certain treated wood biomass can be listed as a boiler fuel. SLMA and its industry partners are working to encourage EPA to change the NHSM rule.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

EPA/Corps Rule to Clarify Jurisdiction of "Waters of the U.S."

Recent Developments. On July 15, 2019, EPA submitted a final draft of the planned rule to repeal the 2015 WOTUS Rule. The repeal rule was first proposed 2 years ago and has been undergoing internal review. The repeal is the first step in the agency's "two-step" plan to repeal then replace the WOTUS Rule.

On May 28, 2019, a federal court in Texas ruled that the 2015 WOTUS Rule violated the procedural requirements of the Administrative Procedures Act. The Court further remanded the rule to the EPA for reconsideration of the notice and comment procedures. Unfortunately, this decision has limited nationwide effect as there is now a patchwork of litigation and court-ordered stays issued across the U.S. (see below). It is believed that this decision only affects the case involving the states of Texas, Louisiana and Mississippi (the WOTUS Rule had already been Stayed in these states).

On April 15, 2019, SLMA and its industry partners, the Waters Advocacy Coalition, NAFO, and AF&PA submitted comments to EPA and the Corps on the agencies' February 14, 2019 proposed replacement of the 2015 WOTUS Rule. There is expected to be a massive number of comments submitted on the proposed scope of federal jurisdiction over waters of the U.S.

EPA states that it hopes that the Proposal would allow for a jurisdictional test that is clearer and easier to understand for the regulated community. The proposed rule establishes **six categories** of waters that would be considered "waters of the United States:"

- **Traditional navigable waters** (TNWs): Large rivers and lakes, tidal waters, and the territorial seas used in interstate or foreign commerce.
- **Tributaries**: Rivers and streams that flow to traditional navigable waters. These naturally occurring surface water channels must flow more often than just when it rains—that is, tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.
- **Certain ditches**: "Artificial channels used to convey water" would be jurisdictional where they are traditional navigable waters, such as the Erie Canal, or subject to the ebb and flow of the tide. Ditches may also be jurisdictional where they satisfy conditions of the tributary definition as proposed and either 1) were constructed in a tributary or 2) were built in adjacent wetlands.
- **Certain lakes and ponds**: Lakes and ponds would be jurisdictional where they are traditional navigable waters, or where they contribute perennial or intermittent flow to a traditional navigable water either directly or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream. Lakes and ponds would also be jurisdictional where they are flooded by a "water of the United States" in a typical year, such as many oxbow lakes.
- **Impoundments**: Impoundments of "waters of the United States" would be jurisdictional.
- **Adjacent wetlands**: Under the proposal, wetlands that physically touch other jurisdictional waters would be "adjacent wetlands." Wetlands with a surface water connection in a *typical year* that results from 1) inundation from a "water of the United States" to the wetland or 2) perennial or intermittent flow between the wetland and a "water of the United States" would also be "adjacent." Wetlands that are near a

jurisdictional water but don't physically touch that water because they are separated, for example by a berm, levee, or upland, would be adjacent only where they have a surface water connection described in the previous bullet through or over the barrier, including wetlands flooded by jurisdictional waters in a typical year.

Exclusions: The proposal also clearly outlines what would not be "waters of the United States," including:

- Waters that would not be included in the proposed categories of "waters of the United States" listed above—this would provide clarity that if a water or feature is not identified as jurisdictional in the proposal, it would not be a jurisdictional water.
- Ephemeral features that contain water only during or in response to rainfall.
- Groundwater.
- Ditches that do not meet the proposed conditions necessary to be considered jurisdictional, including most farm and roadside ditches.
- Prior converted cropland.
- Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
- Wastewater recycling structures such as detention, retention and infiltration basins and ponds, and groundwater recharge basins would be excluded where they are constructed in upland.
- Waste treatment systems, including all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge).

- In October, a District Court in Texas issued a Stay of the 2015 WOTUS Rule pending the ongoing appeal over its merits. The decision blocks any enforcement of the WOTUS rule during litigation over its merits within the states of Texas, Louisiana and Mississippi. These three states now join the 24 states listed below that also have received a Stay of the WOTUS Rule pending related litigation and rulemakings.

- On June 8, 2018, the U.S. District Court for the Southern District of Georgia issued a Stay of the 2015 WOTUS Rule pending the ongoing appeal over its merits. The decision blocks any enforcement of the WOTUS rule during litigation over its merits within the states of Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin and Kentucky. The decision joins another district court injunction that has been in force since 2015, which applies to 13 states -- namely, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming.

Background. On May 27, 2015, EPA and the Corps issued the final "waters of the U.S." ("WOTUS") Rule. Although EPA asserts that the Final Rule provides increased certainty for regulated entities, critics disagree and expect the newly expanded definition of WOTUS to lead to increased harassment and litigation from public interest groups. It will also lead to a greater need to apply for "jurisdictional determinations" from the agencies prior to taking action that could impact a WOTUS.

State Water Quality Criteria

Recent Developments. None. On April 8, 2019, EPA initiated a 30-day public comment period on its decision to reconsider its 2016 decision to partially disapprove the proposed water quality standards for the State of Washington. This action is being viewed as an indicator that EPA will not seek to impose the more stringent standards previously considered for tribal areas in that State.

On December 3, 2018, a federal judge granted the Trump EPA's request to reconsider the Obama administration's controversial 2015 decision rejecting Maine water quality standards (WQS). This decision clears the way for the agency to roll back a decision that dischargers feared could result in unlawfully stringent permit limits if the agency used a similar rationale in other states. The court has given EPA 12

months to revise its decision. We understand that the Maine legislature is now considering the promulgation of its own water quality standards focused on the protection of Native American sustenance practices.

Background. On December 19, 2017, EPA finalized stringent water quality standards for certain parts of Maine that are similar to those recently finalized for Washington. For several years, EPA has insisted that it must go beyond the national Human Health Water Quality Criteria ("HHWQC") and adopt EPA's unreasonably conservative and unrepresentative values, citing both environmental justice concerns and tribal trust responsibilities. SLMA is monitoring the issue and will work with its partners to get involved as needed. In November 2017, an industry association filed a Petition for Reconsideration to EPA for the Washington State rule.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

Recent Developments. None. On September 24, 2018, SLMA submitted comments, along with the Forest Landowners Association, supporting the proposed amendments to the ESA. On July 24, the Departments of the Interior and Commerce proposed amendments to ESA regulations for a 60-day comment period. The proposals adjust some long-standing rules and also revisit changes made by the Obama administration. Among other things, the proposal requests public comment on the following issues:

- Whether economic impact data would be useful at the time of listing (though the law will continue to prohibit the consideration of economic impacts in a listing decision);
- Restoring the pre-2016 rule that limits consideration of unoccupied areas as critical habitat to situations where there is inadequate occupied habitat; and
- Rescinding Interior's "Blanket Rule" that automatically gave threatened species the same protections as endangered species (Commerce has always considered whether to extend such protections at the time of listing).

Designation of Critical Habitat for the Black Pine Snake

Recent Developments. None. November 13, 2018, SLMA joined comments submitted by the Forest Landowners Association on the USFWS' re-opening of the public comment period on a proposal to designate critical habitat in 9 counties in Mississippi and 1 county in Alabama for the Black Pine Snake. The species was listed as threatened in November 2015.

ESA Review of Tri-Colored Bat

Recent Developments. None. The U.S. Fish and Wildlife Service (USFWS) has initiated a 12-month review to determine whether to list the Tricolored Bat under the Endangered Species Act (ESA). The underlying rationale for the review is the decline of the species population due to White Nose Syndrome (WNS). If the USFWS determines the bat is endangered, then habitat conservation measures similar to those proposed for the Northern Long-Eared bat would be likely. We will monitor the development of this potential rulemaking as it moves forward.

Proposed Listing of Northern Long– Eared Bat ("NLEB")

Recent Developments. The Court has scheduled a status conference for October 4, 2019; however, the scope of topics to be discussed at that time is unclear. As noted below, the parties are still waiting on a decision from the Court.

On August 24, 2018, the Court announced that it was cancelling the previously scheduled oral arguments on the pending Motions for Summary Judgment for this case. The Court indicated that it believes it can rule on the Motions without the need for oral argument. Earlier, the Court bifurcated briefing in the case, with this first phase focused on the listing decision, and the second phase will be focused on the 4(d) provisions within the rule.

Background. On January 14, 2016, the USFWS published a Final Rule under Section 4(d) of the Act. The Final Rule authorizes certain incidental/unintentional "takes" (i.e., harm or death) including those associated with "forest management activities" in certain areas. The USFWS acknowledges that the NLEB is threatened due primarily to a disease known as "White Nose Syndrome" (WNS). As such, the Final Rule has differing restrictions depending on whether an area is within the WNS Zone or not.

Listing of Louisiana Pine Snake as Threatened

Recent Developments. None. On April 5, 2018, the USFWS designated the Louisiana Pine Snake as "threatened" under the Endangered Species Act. The snake is found in isolated areas of Louisiana and Texas. Because the species was designated as threatened, as opposed to endangered, the USFWS also proposed a special "Section 4(d)" rule that would permit and encourage beneficial forest management across the pine snake's habitat, provided specific conditions to protect the snake and its main food source — Baird's pocket gopher — are met.

Proposed Listing of Eastern Diamondback

Recent Developments. None. USFWS's decision on the petition is past due and may be issued at any time.

OCCUPATIONAL HEALTH & SAFETY ACT

Prepared by Kilpatrick Townsend.

Workplace Injuries and Illnesses Recordkeeping

Recent Developments. None.

Background. Under OSHA's recordkeeping regulations (29 C.F.R. § 1904), covered employers must prepare an OSHA 301 Incident Report or equivalent form for certain work-related injuries and illnesses. Employers must also document each recordable injury or illness on an OSHA 300 Log. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, these employers must review their OSHA 300 Logs to ensure that they are complete and accurate and must correct any deficiencies. At the end of each calendar year, all employers, except those who are exempt from OSHA's recordkeeping requirements, must also create an annual summary of the injuries and illnesses using the OSHA Form 300A or equivalent form. Employers are required to retain these records for five years following the end of the calendar year that these records cover.

Recordkeeping citations are low-hanging fruit for OSHA. The Occupational Safety and Health Act states that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

Workplace Injuries and Illnesses Reporting

Recent Developments. None.

Background. As of January 1, 2015, all employers must report work-related fatalities to OSHA within eight hours of the incident resulting in the fatality and must report to OSHA all work-related in-patient hospitalizations that require care or treatment, all amputations, and all losses of an eye within twenty-four hours of the incident.

On May 11, 2016, OSHA issued the final rule requiring employers to electronically submit injury and illness data on an annual basis. The final rule originally required establishments with 250 or more employees to annually submit the OSHA 300 Log, OSHA Form 300A, and OSHA Form 301 incident reports, while establishments with 20 to 249 employees in certain industries (such as manufacturing) are only required to submit the OSHA Form 300A. On January 24, 2019, OSHA eliminated the requirement that large employers submit their OSHA 300 Logs and OSHA Form 301 incident reports. Covered employers are still required to

submit their OSHA Form 300A on an annual basis. Beginning in 2019, covered employers must submit the prior calendar year's OSHA Form 300A data to OSHA by March 2.

The electronic reporting rule also expressly prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. To that end, the rule requires employers to inform employees of their right to report work-related injuries or illnesses without retaliation. This notice requirement may be satisfied by posting the OSHA Job Safety and Health – It's The Law worker rights poster from April 2015 or later). In addition, the employer must ensure that its procedure for reporting work-related injuries and illnesses is reasonable and does not deter or discourage employees from reporting.

The OSHA Injury Tracking Application and additional information regarding the electronic reporting requirement are available at: https://www.osha.gov/injuryreporting/

Combustible Dust Standard

Recent Developments. None.

Background. OSHA has been in the process of developing a comprehensive general industry standard to address combustible dust hazards since 2009. In 2017, the proposed standard was removed from the federal regulatory agenda. While a dedicated combustible dust standard is no longer a priority for OSHA at this time, the agency retains authority to cite employers for combustible dust hazards under the "general duty" to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious harm," and housekeeping obligations set out in other OSHA standards, such as the recent Final Rule on walking-working surfaces and fall protection systems. Employers should also look to guidance from industry consensus standards, such as the 2017 edition of the NFPA Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities ("NFPA 664") and the 2019 edition of the NFPA General Standard on the Fundamentals of Combustible Dust ("NFPA 652").

Under NFPA 652, all facilities with combustible dust hazards must have a Dust Hazard Analysis ("DHA") completed by a professional safety consultant by September 7, 2020. Companies considering material modifications or system upgrades between now and September 2020 should confirm that they meet the specifications in NFPA 652 and 664. A DHA is a systematic review to identify and evaluate potential fire, flash fire, or explosion hazards associated with the presence of combustible dust in a process or facility and provide recommendations to manage the hazards (similar to OSHA's Process Hazard Analysis for hazardous chemicals). Once a hazard analysis is completed, OSHA generally expects facilities to implement the recommendations as soon as possible, but in any event, no later than one to two years after the hazard analysis is completed. Thus, at the conclusion of the DHA, if systems or equipment are found non-compliant with NFPA specifications, they must be upgraded. The DHA must be reviewed and updated every five years.

Request for Information Regarding Lockout/Tagout Standard

Recent Developments. OSHA is requesting information on a possible update to the Control of Hazardous Energy (Lockout/Tagout) Standard. The current Lockout/Tagout Standard was last updated in 1989. OSHA is specifically interested in how employers are using control circuit devices including the types of circuitry and safety procedures being used; limitations of their use to determine under what other conditions control circuit-type devices could be used safely; new risks of worker exposure to hazardous energy as a result of increased interaction with robots; and whether the agency should consider changes to the Lockout/Tagout Standard that would address these new risks. Comments are due on August 19, 2019.
SLMA will submit comments with the National Association of Manufacturers (NAM) focusing on the following key issues of interest to the manufacturing industry:

1. Use of control circuit devices that provide for the exclusive control of employees performing maintenance and servicing are common in the manufacturing sector and are as protective as lockout/tagout.

2. In addition to control circuit devices, many types of machines in manufacturing are equipped with interlocks that involve multiple re-energization steps and that also should be permitted to be used, outside of lockout/tagout. For many of these machines, the interlock is designed to prevent the machine from engaging when any person or object is in the zone of danger. (According to NAM, this is not specifically addressed in the RFI but is of vital importance to the industry.)

3. Some states and other countries have eased lockout/tagout requirements as it relates to manufacturing. This point will be raised in comments, along with a discussion of the alternative methods permitted in various consensus standards.

4. A discussion of robotics, informing the agency of their use in manufacturing and safety features built into robotics.

The complete list of questions on which OSHA seeks input is available at: http://s3.amazonaws.com/public-inspection.federalregister.gov/2019-10247.pdf. Comments may be submitted to OSHA electronically at https://www.regulations.gov; by fax at (202) 693–1648; or by regular mail to OSHA Docket Office, Docket No. OSHA–2016–0013 or RIN, 1218–AD00, Technical Data Center, Room N3653, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. All comments must reference Docket No. OSHA–2016–001.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Dangers Regarding FMLA

Recent Developments. Most employers are familiar with their obligations under the Family and Medical Leave Act (FMLA) and allow 12 weeks of such leave per year. Even where employers follow these rules, they can still run afoul of the retaliation aspects of the FMLA. A couple of recent cases illustrate this danger.

Background. In the first case, the plaintiff was disciplined within one month of asking for FMLA and roughly a week after returning from an FMLA leave of about 13 days. The employer, Marriott, contended it disciplined the plaintiff for insubordination, not for taking FMLA leave. The hotel said the plaintiff failed to comply with a manager's instructions to place vanilla cakes in a display case, and the plaintiff said she complied with that order despite believing the cakes should not have been put out because they were frozen. A federal judge denied the defendant's motion for summary judgment, finding that it was not a reasonable job assignment if a jury credit's plaintiff's testimony over her manager's. The judge indicated that the close timing between the request for leave, the taking of leave, and the discipline, would allow a jury to connect the plaintiff's protected activity with the defendant's discipline. *Tsige v. Marriott Hotel Services, Inc., 2019 BL249750 (D.Md. 7/5/19).*

In another case involving the FMLA, the court ruled that an employer improperly fired the plaintiff after he went on vacation to Mexico during the final two weeks of a medical leave to recover from foot surgery. The employer apparently confronted the plaintiff with photographic evidence of activities he participated in while out on medical leave, and the employer contended that such activities were inconsistent with someone who claimed to have limited mobility. He was fired for misrepresenting the extent of his injury when he applied for the medical leave.

The case went to a jury trial, which awarded the plaintiff $1.3 million, which included some $715,000.00 in punitive damages. It has been suggested that this case illustrates that an employee is not necessarily abusing medical leave even when they go on vacation during the protected time off work. *DaPrato v. Mass. Water Resources Authority, Mass. No. SJC-12651, 6/5/19.*

Editor's Note: The above cases should send a warning to employers who are considering disciplining an employee around the time they are taking FMLA leave. While the above dangers are always present, they represent very pro-plaintiff views that are in contrast to the more reasonable views of perhaps a majority of the courts. For example, many cases recognize a defense when an employer has conducted a full and complete investigation, and formed an honest belief that the employee was abusing FMLA leave or committed some other disciplinary offense.

Obesity Alone May Not Be Protected by ADA

Recent Developments. Obesity remains a controversial issue under the Americans with Disabilities Act (ADA).

Background. Employers received some relief from the issue in a recent court ruling that obesity unaccompanied by an underlying physiological condition is not a disability protected by federal law. Richardson v. CTA, No. 17-3508 (C.A. 4, 6/12/19); see also Aumara v. Monsanto, 2019 BL218595 (E.D. La., 6/13/19) (even if morbid obesity is an impairment, plaintiff cannot show his weight substantially limits major life activity). In this case, plaintiff was a severely obese bus driver with the Chicago Transit Authority.

The Authority contended that the plaintiff's weight exceeded the limit of the driver's seats and made it difficult for him to operate the bus pedals properly. The court found that the employer thus had non-discriminatory reasons for the termination. More importantly, the court joined three other federal appeals courts in finding that obesity unaccompanied by an underlying physiological condition simply isn't protected. The court saw weight as a physical characteristic just like eye and hair color, not a disability.

Editor's Note: While the Second, Sixth and Eighth Circuit Court of Appeals has reached results similar to that of the Seventh Circuit in the *Richardson* case, the Equal Employment Opportunity Commission and the First Circuit have issued rulings indicating that obesity alone could be protected from discrimination.

Comparing Old to New Hiring Techniques

Recent Developments. American companies for many years filled almost 90% of annual vacancies from within the company, but that portion has now fallen to less than a third. Skeptics suggest that this decline is in spite of the fact that some research suggests that outside hires take three years longer to perform as well as internal candidates, and also cost more. Some worker selection techniques have gravitated towards a battery of tests, even remote criterias such as facial expressions and word usage. Many question such remote tests and argue that, consistent with federal discrimination laws, applicants should be tested for the skills directly required for the job.

Background. Interviews remain the "go to" process, and the use has increased over the years, not decreased. Many believe the best interview strategy is to ask applicants the same set of predetermined questions, so that the answers can be fairly compared. It is believed that some managers may place too much emphasis on "culture," which tends to subject the applicant to the biases of the interviewers, with the results to recruit people like themselves. Even complicated testing algorithms based on the characteristics of existing employees can lead to the same result.

Everyone watches what Walmart does, as it is the country's largest private employer. Walmart is currently using virtual reality headsets to test which employees have the aptitude for promotions into management. The headsets place Walmart employees in real-life situations, to test their decision-making and leadership capacities as well as their skills. Common on-the-job issues can be virtually replicated and standardized for all interested persons, resulting in job-related selection processes without bias. Other companies using such programs include Johnson & Johnson and Farmers Insurance, which uses such VR programs for training.

Hair Style and Dress Codes

Recent Developments. Traditionally, the discrimination laws have not addressed dress codes and hair styles, because these characteristics are mutable. That is, most people can readily change their hair styles and dress.

Background. For example, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta has stated in the last year that "every court to have considered the issue" has indicated that hair style discrimination is not a type of racial bias barred by federal law because it is a mutable, or alterable, characteristic. EEOC v. Catastrophe Management Solutions, 129 FEP Cases 935 (C.A. 11, 2016). However, workers who bring religious-based hair discrimination claims appear to have a better chance of prevailing. In one case, for example, the Third Circuit in Philadelphia, found that an employer's policy failed to accommodate an employee with DREAD LOCKS, which were maintained as part of his Rastafarian faith. The EEOC last year secured a $4.9 million discrimination settlement with UPS, on behalf of job applicants who wore beards and long hair for religious reasons.

More recently, however, there have been several changes in local laws. Two major cities, New York City and Chicago, passed local laws protecting hair styles closely associated with racial or ethnic identities. Some research suggests, for example, that a majority of black women have to change their hair to get hired or otherwise accepted in the workplace. California and New York are the first states to pass a law adding the phrase "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hair styles."

Employers seem to have even more discretion in setting appropriate dress codes in the workplace. The main type of discrimination issue that might arise is not one based on race but more likely to be one based on sex, in situations where females are held to tighter dress codes than males. Requiring generally professional type dress equally applicable to males and females would not seem to violate these concepts. A modern trend in industry is to allow for more informal types of dress, as a recruitment and retention tool. In a recent development, even the stodgy New York financial firm, KKR, along with other Wall Street companies, relaxed their dress codes and no longer require suits, ties or heels, allowing employees flexibility. At KKR, one of the world's largest private-equity firms, the memo does not specify exactly what types of clothes are appropriate, but instead uses general terms like, "We trust you all to strike the right balance and exercise good judgment . . . . At the same time, we recognize that many of our clients and other external relationships have a more formal expectation of "professionalism" . . . so please always have business attire available."

Will ObamaCare Last?

Recent Developments. There is an important case pending before the Fifth Circuit U.S. Court of Appeals, dealing with whether ObamaCare will survive or instead be declared unconstitutional.

Background. Last December, a Texas federal judge invalidated the entire law, after Congress in 2017 passed a law that reduced the penalty provisions to employees for being uninsured to $0. It is argued that this leaves the ACA as a stand-alone command to buy an insurance product that the federal government deems suitable, but it does not raise any revenue, and thus cannot be considered the "tax" aspect that was necessary to sustain its constitutionality under an earlier Supreme Court ruling. Two of the three judges on the appeals court indicated that they were dubious that without the mandatory provisions the law would be constitutional. Even if portions of the law should be invalidated, however, other unrelated portions may remain, and in any event the issue is likely to eventually go back to the U.S. Supreme Court.

In a related development, the Administration announced on 6/13/19 a plan to let employees use special pre-tax health arrangements known as HRAs, which are funded by employers with pre-tax dollars, to buy individual insurance, including policies that do not comply with the ACA provisions. The starting date for the plan is January 2020. While the plan may expand coverage to another one million people previously uninsured, critics say the approach may encourage consumers to pull out of the ACA insurance pool.

How Agencies Interpret Their Own Regs

Recent Developments. Many businesses have complained about federal agencies having too much power to interpret the laws they enforce.

Background. For example, rather than amending the law or following the process to issue a new or revised regulation, agencies often issue fact sheets, operations handbooks, court briefs, and other statements and they ask the courts to follow the agencies' interpretations. In a case called Auer v. Robbins in 1997, the Supreme Court had ruled that lower courts must defer to federal agencies' interpretations of their own rules. The 1997 ruling was written by Justice Scalia, a staunch conservative, who later came to consider his opinion a mistake. Since then, many thought that the Auer precedent would be overturned, but surprisingly it has survived, although in a weakened state, in a decision made by the U.S. Supreme Court in June 2019 in Kisor v. Wilkie.

The majority 5-4 opinion indicates that an Auer deference should apply only when a regulation is "genuinely ambiguous," when an agency's interpretation is reasonable and when its approach stems from its "substantive expertise" and "fair and considerate judgment." The Court says that deference is "rarely" warranted when an agency has changed its interpretation.

The ruling will affect federal labor and employment agencies including the Labor Department, OSHA and the EEOC. Their regulations are commonly involved in cases where their interpretations of regulations are major issues. The bottom line is that the courts will be less willing in the future to defer to an agency's interpretations of its own regulations, and instead more inclined to interpret the regulation itself.

It should be noted that there is another type of deference, cited in the famous case of *Chevron v. Natural Resources Defense Council* in 1984, in which courts are supposed to defer to an agency's interpretation of a statute which is ambiguous. Chief Justice Roberts, who concurred with the more liberal members in Kisor, remarked that he does not see the Kisor decision as relating to the *Chevron* deference given to a statute, as opposed to an agency's interpretation of a regulation.