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This report only contains information on issues that have changed since the last edition. To view all Clean Air, Clean Water, Occupational Hazard and Safety, and Employment Law issues being tracked by SLMA, please visit the archives of past reports in the Members Only section of www.slma.org.

CLEAN AIR ACT*Prepared by Kilpatrick Townsend.***Plywood and
Composite Wood
Products MACT**

Recent Developments. None. On October 5, 2017, the Information Collection Request (“ICR”) was finalized and sent to affected “major source” facilities. The ICR seeks a broad range of information, including emission inventories, compliance demonstrations, process changes and information about control technologies/practices. Facilities have 120 days to submit their response.

In addition, EPA previously announced that it will be scheduling several plant tours in the coming months to gather additional information related to the potential rulemaking.

**Biogenic Carbon
Emissions**

Recent Developments. None. The recently passed federal spending bill for 2017 included a directive to the EPA, Department of Energy, and Department of Homeland Security to establish policies that reflect the carbon neutrality of biomass. This directive should accelerate EPA’s ongoing work on developing a methodology for addressing CO₂ emissions from combustion of biomass. This Biogenic Accounting Framework will have far-reaching implications in EPA’s air regulatory program.

**Boiler MACT
Rulemaking/
Litigation**

Recent Developments. None. In the Boiler MACT reconsideration rule litigation, oral argument had been scheduled for September 15, 2017. 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.

In the primary case appeal, on December 23, 2016, the DC Circuit issued an order granting EPA’s petition for rehearing of the remedy portion of the court’s July 29, 2016 decision. The court held that EPA improperly excluded the emissions data from some boilers when establishing standards for certain subcategories of major source boilers. The court initially decided to vacate (terminate) these defective standards, but EPA asked the court to change its prescribed remedy from vacatur to remand. All other petitions for rehearing were denied and the court issued the mandate in the major source and area source cases. The issuance of the mandate signifies the end of the litigation. All of the emission standards in the rule will remain in effect while EPA addresses the defective standards on remand.

**NHSM Rulemaking/
Litigation**

Recent Developments. On October 27th, the Office of Management & Budget announced that it is conducting a final review of the proposed EPA rule to categorically list creosote borate, copper naphthenate and copper naphthenate-borate treated railway ties as a non-waste fuel under the Non-Hazardous Secondary Materials rule. We expect OMB to take 90 days to complete its review.

Background. On November 1, 2016, EPA published a proposed rule to categorize the following materials as non-waste fuels under certain conditions: processed creosote-borate, copper naphthenate and copper naphthenate and copper naphthenate-borate-treated railroad ties. Due to this proposed classification, the combustion of these fuels would not be considered incineration.

**Climate Change
Regulation**

Recent Developments. None. On October 10, 2017, EPA signed a Proposed Rule to repeal the Clean Power Plan. The Proposed Rule has not been published in the Federal Register yet. Once it is published, interested persons will have 60 days to submit comments to the agency.

Previously, on April 28, 2017, the D.C. Circuit granted EPA’s request to pause litigation over the Clean Power Plan. The Court asked the parties to prepare briefs assessing whether the Court should remand the Rule to EPA for reconsideration or remain on hold indefinitely.

Background. On March 28, 2017, the President issued an Executive Order titled “Promoting Energy Independence and Economic Growth.” Among other things, this Order directs EPA to review the Clean Power Plan and the new source greenhouse gas rules for consistency with the Order and take appropriate action to suspend, revise or rescind the rules. EPA has sent a notice for publication to the Federal Register initiating the review of the Clean Power Plan.

Revised Ozone Standard

Recent Developments. None. On July 18th, the House passed the Ozone Standards Implementation Act of 2017. If finalized, the Act would, among other things: extend the schedule for implementation of the 2015 Ozone Standards; change the mandatory NAAQS review period from 5 to 10 years; and authorize EPA to consider technological feasibility when revising NAAQS.

The D.C. Circuit announced that it will delay oral argument in its review of challenges to the new ozone standard indefinitely in order to allow EPA and the Trump Administration time to review the rule for possible revocation or revision.

Background. Comments on the November 17, 2016 proposed rule to implement the new 2015 ozone standard were due on February 13th. SLMA participated in the development and submittal of comments with an industry association requesting that states be provided additional flexibility and less burdens in the final rule.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

EPA/Corps Rule to Clarify Jurisdiction of “Waters of the US”

Recent Developments. On November 5, 2017, EPA and the Army Corps sent a proposed rule delaying the effective date of the Waters of the U.S. Rule to the White House for review. An agency spokeswoman said the action would “amend the effective date associated with the 2015 Clean Water Rule to give the agencies time to consider the two-step process proposing to rescind and revise the 2015 rule.” The new proposed rule is separate from any rule intended to replace WOTUS. The agency declined to say when the new effective date would be or if it would make any other tweaks to the regulation.

On September 27, 2017, SLMA signed on to comments prepared by the Waters Advocacy Coalition in support of the EPA and Corps’ Proposed Rule to repeal the Obama Administration’s WOTUS Rule. The Proposed Rule would re-instate the pre-WOTUS regulatory definition of regulated waters of the U.S. and would roll-back the Obama-era rule’s expanded definition of such waters. In effect, the Proposed Rule would maintain the *status quo* as the current WOTUS Rule has been stayed by the Sixth Circuit. The Proposed Rule is the first step in a two step-process. Assuming the Proposed Rule is finalized and the previous regulatory interpretation of regulated waters is re-instated, the agencies would then initiate a thorough and substantive re-evaluation of the proper definition of “waters of the U.S.” The agencies point out that such efforts would rely heavily on state input into what federal regulation, if any, is appropriate for waters within their states.

In addition, the Supreme Court heard oral arguments on October 11th for the case involving the appropriate judicial jurisdiction for challenges to the underlying WOTUS Rule.

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.

In October 2015, the Sixth Circuit issued a stay of the effectiveness of the WOTUS Rule which prohibits the EPA and Corps from implementing the Rule until the current litigation regarding the legality of the Rule is completed. The decision to grant the Stay indicates that the Sixth Circuit may believe that the industry petitioners in the case have a strong likelihood of success on the merits of the case.

On January 25, 2017, the Sixth Circuit granted an industry association's motion to Stay the case in order to allow the U.S. Supreme Court to issue its decision regarding the proper jurisdiction and venues for the ongoing WOTUS cases.

On February 28, 2017 President Trump signed an Executive Order directing the EPA and Corps to reconsider the controversial "Waters of the United States" rule. The WOTUS Rule was finalized in 2015 and has been criticized as an attempt by EPA to extend its jurisdictional reach far beyond the traditional concept of "navigable waters." The Rule is currently stayed, due to a prior order of the Sixth Circuit, pending ongoing litigation.

The President's Order states that it is intended to "to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles played by Congress and the States under the Constitution." The Order directs the agencies to review the Final Rule in light of the goals listed above, and then to publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

The Order further directs the agencies to keep in mind Supreme Court Justice Scalia's interpretation of the appropriate definition of WOTUS as set forth in the 2006 *Rapanos v. United States* decision. In that decision, Scalia authored a dissent from the majority opinion. In his dissent, Scalia opined that wetlands or tributaries adjacent to traditional navigable waters should only also be considered a navigable water if it is "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." This interpretation is much narrower than Justice Kennedy and the majority's opinion that wetlands and tributaries that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,' " are subject to federal jurisdiction.

With respect to the ongoing federal court cases involving challenges to the WOTUS Rule, the Order also directs the Attorney General to, as he deems appropriate, inform the courts of such review and take such measures as he deems appropriate concerning any such case or action pending the completion of further administrative proceedings related to the rule.

It is expected that the Trump Administration will work closely with the EPA and Corps on a rewrite to the WOTUS Rule. This process will likely take several years.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. Briefing is underway in the NLEB case. In late April, Plaintiffs filed a brief challenging the listing of the NLEB as threatened, as opposed to endangered. USFWS and interveners' briefs are due to the Court in early and late July, respectively. The Court has bifurcated briefing in the case, with this first phase focused on the listing decision, and the second phase will focus on the 4(d) provisions within the rule.

Background. On January 14, 2016, the U.S. Fish and Wildlife Service (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.

The key points in the Final Rule are as follows:

- For areas outside the WNS Zone, incidental takes of NLEB resulting from tree removal or other forest management activities are not prohibited.
- For areas inside the WNS Zone, the following activities are prohibited:
 - Actions that result in incidental takings within or within the entrance to a “known hibernacula,” defined as any cave, mine or other location where bats have previously been known to hibernate during winter.
 - Tree removal activities that result in the incidental take, when the activity:
 - ♦ Occurs any time of the year and takes place within 0.25 miles of a known hibernaculum; or
 - ♦ Occurs during the pup season (June 1 - July 31) and cuts or destroys “known occupied maternity roost trees,” defined as any tree that has hosted female or juvenile bats in the past and remains suitable for re-use, or any other tree within a 150-foot radius of such roost trees.

It is important to note that tree removal activities within these designated areas are not prohibited. Rather, tree removal activities that result in an incidental take are prohibited. Therefore, forest activities may occur in these areas provided that proper precautions are taken to avoid incidental takings. The USFWS encourages landowners to work with their state-level natural resource staff to coordinate tree removal activities.

OCCUPATIONAL HEALTH AND SAFETY ACT

Prepared by Kilpatrick Townsend.

Assistant Secretary of Labor for OSHA Nomination

On November 1, 2017, President Trump nominated Scott A. Mugno, currently the Vice President of Safety, Sustainability, and Vehicle Maintenance at FedEx Ground, as Assistant Secretary of Labor for OSHA. Both worker advocates and business groups have applauded Mugno’s nomination. Mugno, who began his career at FedEx as an attorney, is currently the Chairman of the U.S. Chamber of Commerce’s OSHA subcommittee. If confirmed by the Senate, Mugno is expected to bring a pragmatic approach to the agency, with an eye towards eliminating and streamlining outdated and onerous regulatory standards.

Combustible Dust Standard

Recent Developments. The American Forest and Paper Association has proposed changes to the 2021 International Fire Code (IFC) allowing the use of compressed air and steam for combustible dust housekeeping purposes in an effort to align IFC requirements with National Fire Protection Association (NFPA) Standards 652 (Standard on the Fundamentals of Combustible Dust), NFPA 654 (Standard for the Prevention of Fire and Dust Explosions), and NFPA 6 (Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities).

Background. OSHA is in the process of developing a comprehensive general industry standard to address combustible dust hazards, but the proposed standard remains in the pre-rule phase.

OSHA originally issued its notice of proposed rulemaking for combustible dust in October 2009 and has been collecting information for several years. However, very little movement has been made toward a final rule. In June 2016, OSHA published a new fact sheet on “Protecting Workers from Combustible Dust Explosion Hazards.” The new fact sheet may be downloaded from the OSHA Publications webpage at: <https://www.osha.gov/pls/publications/publication.html>.

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 2016 edition of the NFPA General Standard on the Fundamentals of Combustible Dust (“NFPA 652”).

Companies considering material modifications or system upgrades in the next three years should confirm that they meet the specifications in NFPA 652 and 664. Under the current draft of the 2019 NFPA standard on combustible dust, all facilities with combustible dust hazards must complete a Dust Hazard Analysis (“DHA”) by September 7, 2020. 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 will need to be upgraded.

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). On December 19, 2016, OSHA issued a final rule to clarify employers’ ongoing duty to make and maintain an accurate record of each recordable injury and illness.

Under the final rule, if an employer failed to prepare an OSHA 301 Incident Report and update the OSHA 300 Log within the seven-day recording period, the employer would remain on the hook to make the required records during the entire five-year record retention period, and non-compliant employers could receive an OSHA citation up to five years after a recordable injury or illness occurred.

The final rule became effective on January 18, 2017. On March 1, 2017, Congress approved a resolution to overturn the final rule and to restore the long-standing six-month citation period. The resolution was approved by the Senate and signed by President Trump on April 3, 2017. On May 3, 2017, OSHA officially withdrew the final rule from the Code of Federal Regulations. OSHA now cannot issue a recordkeeping citation to an employer for failure to record a workplace injury or illness more than six months after the recordable injury or illness occurred.

Workplace Injuries and Illnesses Reporting

Recent Developments. With OSHA's proposed deadline for electronically submitting 2016 OSHA Form 300A data set to expire on December 1, 2017, OSHA has extended the deadline to **December 15, 2017**. Employers must submit their information from their 2016 OSHA Form 300A through the OSHA Injury Tracking Application by the **December 15, 2017** deadline. The data submission process consists of four steps: 1) creating an establishment account; 2) adding 300A summary data; 3) submitting data to OSHA; and 4) reviewing the confirmation email from OSHA. OSHA estimates that the entire submission process will take approximately twenty minutes. The OSHA Injury Tracking Application and additional information regarding the electronic reporting requirement are available at <https://www.osha.gov/injuryreporting/>. OSHA has not indicated whether it will proceed to publish employer-provided injury and illness data, as originally contemplated by the final rule. The anti-retaliation provisions of the final rule remain under review.

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 requires 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. The final rule required all covered establishments to submit the preceding year's OSHA Form 300A to OSHA by July 1, 2017, but OSHA has since proposed extending the deadline to December 1, 2017 to allow the new administration time to review the Final Rule's requirements before implementation. Establishments with 250 or more employees will submit the preceding year's OSHA Form 300A and OSHA Form 301 incident reports, along with the OSHA 300 Log, to OSHA starting on July 1, 2018 and on an annual basis thereafter. OSHA intends to publish data from the submissions (without employee names and other personal identifiable information) on a publicly accessible website.

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.

In the Spring 2017 Unified Agenda of Federal Regulatory and Deregulatory Actions, OSHA reiterated its intention to re-evaluate the electronic reporting rule. The electronic reporting requirements are currently under review by the new administration, and a request for information relating to its anti-retaliation provisions is anticipated.

Walking– Working Surfaces and Fall Protection Standards

Recent Developments. None.

Background. OSHA adopted general industry standards on Walking-Working Surfaces (29 C.F.R. part 1910 subpart D) and Personal Protective Equipment (29 C.F.R. part 1910, subpart I) in 1971. OSHA issued proposed rules to update the Walking-Working Surfaces and PPE standards in 1973 and 1990. OSHA reopened the record in 2003 and in 2010, published a new proposed rule. The last series of hearings and public comment periods on the most recent iteration of the proposed rule ended in 2011.

On January 18, 2017, OSHA's final rule updating general industry walking-working surfaces and fall protection standards went into effect.

The updated requirements apply to the use and maintenance of fall protection systems, fixed and portable ladders, stepstools, mobile ladder stands, mobile ladder stand platforms, and stairways.

Employers may choose from several fall protection options, such as guardrail systems, safety net systems, personal fall arrest systems, positioning systems, travel restraint systems, and ladder safety systems. The final rule also requires employers to equip all fixed ladders that extend more than 24 feet with some form of fall protection. By **November 19, 2018**, existing fixed ladders that currently do not have any fall protection must have a cage, well, ladder safety system, or personal fall arrest system, and new ladders and replacement ladder sections must have either a ladder safety system or personal fall protection system. By **November 18, 2036**, *all* fixed ladders that extend more than 24 feet must have a ladder safety or personal fall arrest system. The final rule also required employers to train (and retrain as necessary) employees who are exposed to fall hazards on fall prevention and the proper use of fall protection equipment by **May 17, 2017**.

OSHA Request for Information on Lockout/Tagout Standard

OSHA is soliciting public comments regarding the information collection requirements in the Lockout/Tagout Standard. The current information collection requirements are as follows:

Energy Control Procedure. With limited exception, employers must document the procedures used to isolate from its energy source and render inoperative any machine or equipment prior to servicing, maintenance, or repair by workers. These procedures are necessary when activation, start up, or release of stored energy from the energy source is possible, and such release could cause injury to the workers. The required documentation must clearly and specifically outline the scope, purpose, authorization, rules, and techniques workers are to use to control hazardous energy, and the means to enforce compliance. The document must include at least the following elements

- A specific statement regarding the use of the procedure;
- Detailed procedural steps for shutting down, isolating, blocking, and securing machines or equipment to control hazardous energy;
- Detailed procedural steps for placing, removing, and transferring lockout or tagout devices, including the responsibility for doing so; and
- Requirements for testing a machine or equipment to determine and verify the effectiveness of lockout or tagout devices, as well as other energy control measures.

Protective Materials and Hardware. Lockout and tagout devices indicate the identity of the employee applying them. Tags warn against hazardous conditions if the machine or equipment is energized. In addition, the tag must include a legend such as one of the following: Do Not Start; Do Not Open; Do Not Close; Do Not Energize; Do Not Operate.

Periodic Inspection Certification Records. Employers are to conduct inspections of energy control procedures at least annually. An authorized worker (other than an authorized worker using the energy control procedure that is the subject of the inspection) is to conduct the inspection and correct any deviations or inadequacies identified. For procedures involving either lockout or tagout, the inspection must include a review, between the inspector and each authorized worker, of that worker's responsibilities under the procedure; for procedures using tagout systems, the review also involves affected workers, and includes an assessment of the workers' knowledge of the training elements required for these systems. Employers must certify the inspection by documenting the date of the inspection and identifying the machine or equipment inspected, the workers included in the inspection, and the worker who performed the inspection.

Training Certification Records. Employers are to certify that workers completed the required training, and that this training is up-to-date.

The certification is to contain each worker's name and the training date. Written certification of the training assures the employer that workers receive the training specified by the standard.

Notification of Employees. The employer or authorized worker must notify affected workers prior to applying, and after removing, a lockout or tagout device from a machine or equipment.

Off-Site Personnel (Contractors, etc.) When an on-site employer uses an off-site employer (e.g., a contractor) to perform the activities covered by the scope and application of the standard, the two employers must inform each other regarding their respective lockout or tagout procedures.

OSHA is particularly interested in whether these information collection requirements are necessary for the proper performance of the Agency's functions, the quality, utility, and clarity of the information collected, and ways to minimize the burden on employers who must comply, such as through automated collection or transmission. To submit comments, go to <http://www.regulations.gov> (Docket No. OSHA-2011-0033). Comments must be submitted by **January 2, 2018**.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Weinstein's Publicity Puts Harrasment on the Front Page

Recent Developments. Reports suggest that the reputation of Harvey Weinstein, the high-profile film maker, was so notorious concerning his relationship with females, that it was mentioned in an introduction of Weinstein at one of the Hollywood award ceremonies honoring Weinstein.

Background. Apparently the "Hollywood" film community has condoned blatant harassment that one would think would have ended years ago. Others accused include Bill Cosby, Roger Ailes, James Topac, Casey Affleck, Pete Rose, Bill O'Reilly, Kevin Spacey and Brett Ratner. Some call the revelations the "domino effect" in Hollywood.

Many of these charges are denied, but at least 20 prominent men are either apologizing for past actions or defending them. The list goes on and on and new charges appear to be arising daily. Apparently, many women now feel empowered to stand up against powerful men who subjected them to harassment, and at least one of the cases involve "same-sex" harassment against men.

One possible reason some of these incidents have not arisen earlier pertains to confidentiality agreements that many claimants sign as part of a settlement. The EEOC asserts that only about 6 to 13 percent of victims formally report workplace harassment to their employer or law enforcement, and many believe that non-disclosure agreements insure that the victims do not have the ability to warn others, which contributes to the culture of silence about workplace harassment.

Undoubtedly, many wonder whether there are any new prevention techniques so that these blatant incidents and cover-ups do not continue. A few employers have used anonymous surveys of employees or even undercover agents to determine if harassment or other misconduct is occurring. Another tactic is to monitor social media for mention of the employer and such incidents. Employers could take additional steps so that employees feel safer about reporting harassment, including the possibility of anonymous hot lines or other avenues for employees to report issues. All such policies should include assurances of confidentiality and non-retaliation.

The starting point is always the policy itself, and it is critically important that the policy be properly written and highly publicized. Supervisors must be trained and must understand that they cannot tell employees to just ignore the problem or person. Obviously, an investigation should follow an accusation and appropriate remedial action taken, and the victim should be notified of the results. The publicity given to the current situation seems unprecedented, and commentators are predicting a surge in sexual harassment and other harassment claims. In a new twist, an activist investor in Cedar Realty Trust, Inc. is calling for an investigation of sexual harassment claims in a lawsuit against the company's Chief Executive, and said any evidence uncovered to back up the allegations should result in his immediate suspension or firing. The activist investor also called for a review to find out if company money was paid out for sexual harassment claims against the company's Chief Executive, arguing that it should have been disclosed to investors.

**Plaintiff's
Discrimination
Lawyers Criminally
Charged**

Recent Developments. In highly-publicized cases arising from litigation in Atlanta, the Georgia Supreme Court has reinstated criminal charges against two attorneys and their client plaintiff who made a sex tape of a sexual liaison with the Chairman of Waffle House. The plaintiff allegedly with her lawyers' knowledge and approval secretly made the tape. Thereafter, one of the lawyers delivered a harsh demand letter to the Chairman and the demand letter suggested that the allegations, if made public, would lead to "injurious publicity" and/or "divorce and destruction of families." A later offer by the lawyers indicated they would settle without filing suit for \$12 million.

Background. The Georgia Supreme Court did dismiss the felony extortion conspiracy charge stemming from the demand letter, indicating that if the ". . . mere threat of legitimate litigation could serve as a proper basis for a charge of extortion, the [statute] could be applied in an overbroad and unconstitutional manner that would run afoul of First Amendment principles protecting the right of individuals to petition the government for a redress of grievances." However, the court reinstated various felony charges against the plaintiff's attorneys accusing them of violating the state's eavesdropping laws. Georgia law generally makes it a crime for any person, through the use of any device, without consent of all persons observed, to photograph or record the activities of others that occur in any private place and out of public view. The judge indicated that the plaintiff and her attorneys ". . . allegedly took actions to agree to make a secret video and actually video recorded others without the consent of the persons being recorded. . . The consent of all parties is needed before a person may use any sort of spying device to photograph or video record the activities of another person in a private place and out of the public view."

The Georgia Supreme Court also disqualified the plaintiff's attorneys from representing her in litigation stemming from her claims that the Chairman coerced her into sex while she was his housekeeper. The Chairman filed a civil suit accusing the plaintiff's lawyers of invasion of privacy and attempting to extort millions of dollars from him based on the secret tape. He has also sued in a separate case the housekeeper herself. The defense in these cases is apparently that, under the circumstances, the place was not a place of privacy. The housekeeper filed her own sexual harassment case against the Chairman, which has been dismissed. The lawyer representing the Chairman referred to the actions of the plaintiff and her attorneys as "sextortion."

**New Development in
Salary Requirements
for Overtime
Exemption**

Recent Developments. There has been a great deal of confusion as to the status of the Obama Administration's overtime rule which would have doubled the annual salary, to more than \$47,000.00, under which certain executive, administrative, and professional employees might qualify for overtime exemption.

Background. Current Labor Secretary Alexander Acosta supports an increase in the current threshold of \$24,000.00 that was set in 2004, and suggested in his confirmation hearing a salary level in the range of \$33,000.00 might be more appropriate.

A federal district court judge invalidated the Obama Administration's overtime rule, but on October 30, 2017, the current Administration filed a notice of appeal of this decision. It now appears that the government will file a motion with the appeals court to hold the appeal in abeyance while the Department of Labor (DOL) undertakes further rule-making to determine what the salary level should be. If the motion is granted, it is likely that the appeal will remain frozen until the Administration publishes a new salary level. The DOL is currently in the midst of reviewing more than 140,000 comments that have been submitted on how the Agency should reconsider overtime eligibility.

American Airlines Set to Pay \$9.8 M to Settle "100%-Healed" Policy Challenge

Recent Developments. American Airlines and the Equal Employment Opportunity Commission (EEOC) have entered into a proposed consent decree calling for a \$9.8 million payment which would settle a lawsuit claiming a "pattern or practice" of disability discrimination against a class of workers nationwide by denying their requests for further accommodation as to their requests to return or not to return to

work.

Background. The case is *EEOC v. Am. Airlines, Inc.*, No. 2:17-cv-04059, proposed consent decree filed 11/3/17 (D. Ariz.). The EEOC in recent years has warned employers that it considers blanket maximum fixed leave limits for workers, and 100-percent-healed requirements to return to work, to violate the ADA. The idea is that such blanket policies may interfere in individual cases with an employer's obligation to reasonably accommodate an employee with a disability.

EEOC Starts Online Filing for Discrimination Charges

Recent Developments. The EEOC announced on November 1, 2017 that it is starting a new online system that will allow workers to ask about potential discrimination and to electronically sign and file discrimination charges against their employer.

Background. The initial steps are preliminary to filing a charge of discrimination that may be taken online, and the EEOC will itself prepare the formal charge of discrimination and allow electronic signing and filing of the charges. The online portal will also allow individuals to update information related to a filed charge, including uploading relevant documents, and to track the status of their charge.

Trends in Consumer-Driven Health Plans

Recent Developments. Reports from Mercer indicate that about 30% of all covered employees are enrolled in high-deductible consumer-driven health plans. These plans generally have higher deductibles but are usually combined with accounts for employees to pay for medical expenses with pre-tax dollars.

Background. The idea is to give employees a choice and make them more responsible in making their healthcare decisions. One problem is whether the average employee has the ability to make informed medical decisions. Some employees may be tempted to receive less care, even when needed. This could lead to an increase in costs from emergency department visits.

Employers are experimenting with health services to help employees evaluate necessary care. Mercer found that 82% of employers with over 500 employees now provide online resources to help employees compare prices and sometimes include quality ratings of different healthcare providers. Many employers are also promoting access to lower-cost telemedicine, which offers access by phone, web portal or video. 71% of employers with over 500 employees now offer these services.

According to a study from the Kaiser Family Foundation and the Health Research and Education Trust, the average American worker is paying \$5,714.00 for a family health insurance plan, 30% of the total cost of \$18,764.00. 81% of workers now face a deductible, at an average of \$1,505.00 for a single person. Employers are finding it increasingly difficult to pass rising health costs onto workers, and so more efforts are being made

to reduce the overall healthcare costs.

Dropping Domestic Partner Benefits May be Casualty

Recent Developments. Many companies are dropping domestic partner benefits, including such companies as Delta, IBM and Verizon.

Background. There seems to be much less need for such benefits in light of the fact that the U.S. Supreme Court has legalized same-sex marriages. In addition to cost savings, many companies find benefit programs easier to administer if they limit coverage to married couples. Other companies are retaining such benefits as a recruitment tool for millennials.

Free Federal Bonding Program Facilitates Hiring

Recent Developments. Many individuals with troubled histories badly want jobs, but employers balk at employing them, citing concerns about honesty or the fear of liability. A little-known federal program more than 50 years old provides the reassurance many employers need to offer these individuals a change. It's fast, and it's free. And it may be just what an employer needs to take a chance on hiring someone with a less-than-perfect background.

Background. In 1966 the U.S. Department of Labor established The Federal Bonding Program (FBP) to provide Fidelity Bonds that guarantee honesty for "at-risk," hard-to-place job seekers. The bonds cover the first six months of employment. There is no cost to the job applicant or the employer. The FBP targets individuals whose backgrounds can pose significant barriers to securing or retaining employment, including:

- ◇ Justice-involved citizens
- ◇ Individuals in recovery from substance use disorders
- ◇ Welfare recipients
- ◇ Individuals with poor credit records
- ◇ Economically disadvantaged youth and adults who lack work histories
- ◇ Individuals dishonorably discharged from the military

Again, there is no cost to the employer or to the job applicant to receive the bonds, which provides \$5,000.00 of coverage and cover the employee for the first six months of employment. The only requirement is that the individual be a full- or part-time employee paid wages (with federal taxes automatically deducted from pay). The program also covers individuals hired by temporary employment agencies. Only self-employed people are excluded.

The FBP program has achieved a remarkable success rate. Since its inception, bonds have been activated only one percent of the time.

Private insurance companies administer the FBP in each state. For more information, visit <http://bonds4jobs.com>.