# December 2019 Regulatory Update

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# CLEAN AIR ACT

***Prepared by Kilpatrick Townsend.***

**Plywood and Composite Wood Products MACT &RTR**

**Recent Developments.** On October 21, 2019, SLMA and its industry partners, including the American Wood Council, submitted comments on the Proposed Rule (discussed below) in support of EPA's decision to not change the program's requirements for the operation of lumber kilns.

On August 22, 2019, EPA issued the Proposed Rule to update the PCWP Risk and Technology Review (RTR). As expected, it concludes that technology has not changed since the 2004 MACT was issued and that public health risks are acceptable within "an ample margin of safety." It also includes changes to the startup, shutdown and malfunction (SSM) provisions, testing and reporting requirements, as well as the issues the wood industry asked EPA to address concerning thermocouples, shutdown work practices, and biofilter averaging periods. As anticipated, it does not address the remanded MACT issues for lumber kilns or other equipment at wood product mills that will be addressed in a separate rulemaking at a later date.

SLMA and its industry partners were previously informed by EPA that the agency would have to 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 was concerned that it would not be able to complete either task by the deadline unless it cuts back on its efforts 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 producers.

**"Once In, Always In" Policy**

**Recent Developments.** None. On October 2, 2019, EPA re-opened the public comment period on the June 26 Proposal discussed below. The new comment period is open until November 1, 2019.

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 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.** None. 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. On February 14, 2019 the House passed the FY2019 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, USDA 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.** None. Although the litigation continues to be stayed indefinitely (see blow), EPA has recently take 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).

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 groups met with EPA recently to discuss potential fixes to the Rule. On March 19, 2018, the D.C. 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 D.C. 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.

# CLEAN WATER ACT

***Prepared by Kilpatrick Townsend.***

**EPA/Corps Rule to Clarify Jurisdiction of "Waters of the US"**

**Recent Developments.** The Final Rule to repeal the 2015 WOTUS Rule was published in the Federal Register on October 22, 2019. Multiple environmental groups have filed legal challenges to the final rule.

On September 12, 2019, EPA announced that it has finalized a rule to replace the 2015 WOTUS Rule. This is the first step in the Trump Administration's 2-part plan to "repeal and replace" the 2015 Rule (proposed replacement rule discussed below). The Repeal Rule was first proposed 2 years ago and has been undergoing internal review. Once the Repeal Rule is formally finalized and published in the Federal Register, it is expected that a number of states and environmental groups will challenge the repeal.

On August 21, 2019, a federal district court in Georgia found that the 2015 WOTUS Rule is both substantively and procedurally unlawful and exceeded the agencies' authority in scope and reach. This is the first court decision to address the substantive elements of the 2015 Rule. The Court remanded the rule back to the agencies for revisions in light of the ongoing rulemakings to replace the 2015 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 the 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 2018, 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 state of Texas, Louisiana, and Mississippi. These three states now join the 24 states listed below that have also 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 greater need to apply for "jurisdictional determinations" from the agencies prior to taking action that could impact a WOTUS.

## Industrial Stormwater General Permitting

**Recent Developments.** None. On February 20, 2019, the National Academies of Sciences released a report titled "*Improving the EPA Multi-Sector General Permit for Industrial Stormwater Discharges (2019)*". The Report's recommendations are intended to significantly ease the regulatory burdens presented by the current General Permit. The Multi-Sector General Permit authored by EPA is used as s guide to state agencies in the issuance of storm water permits specifically for sawmills and wood treating operations. EPA is reportedly studying the Report as the agency develops the next draft Multi-Sector General Permit to be proposed later in 2019.

# ENDANGERED SPECIES ACT

***Prepared by Kilpatrick Townsend.***

**ESA Regulatory Reform**

**Recent Developments.** At least 17 states and multiple environmental groups have filed legal challenges to the recently issued final rule discussed below. Additional lawsuits are also expected.

On August 12, 2019, the Department of the Interior finalized a series of rules, originally proposed last Fall, to significantly revise the process and factors to be used when considering ESA listing decisions. SLMA previously joined the Forest Landowners Association in comments supporting the proposed revisions to the Act. Among other things, the rules would impact the following key issues within the ESA program:

- Agencies will be allowed to solicit and consider economic impact data as part of a species' listing decision;
- An agencies' consideration of unoccupied areas as potential critical habitat for a species will be limited to situations where there is inadequate occupied habitat; and
- Species designated as "threatened" will no longer be required to receive the same level and types of protections as "endangered" species.
- The concept of the "foreseeable future" will be shortened in time and scope such that potential threats to a species such as climate change are no longer required to be considered.

The changes to the ESA would only impact *future* listing decisions. It is expected that the rules will be published in the federal register within a few weeks.

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

**Recent Developments.** None. The Court has now scheduled the status conference for December 6, 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, 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 designate 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 4d" 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 the Eastern Diamondback Rattlesnake**

**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 of 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 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/.

**Amputation**

**Recent Developments.** At the recent National Safety Council Congress and Expo in San Diego, the Deputy Director of OSHA's Directorate of Enforcement Programs announced plans to release an updated version of the NEP on amputations, which is set to expire at the end of the year. We will continue to monitor OSHA activity on this issue.

**Background.** On August 13, 2015, OSHA updated its National Emphasis Program ("NEP") on amputations to include the following targeted industries: "Sawmills," "Wood Preservation," "Wood Window and Door Manufacturing," "Cut Stock, Resawing Lumber, and Planing," "Other Millwork (including Flooring)," and "Wood Container and Pallet Manufacturing." If an employer in one of the targeted industries reports an amputation, it will be subject to an inspection under the Amputations NEP. The contents of the amputations NEP are available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=6228.

## Combustible Dust Standard

**Recent Developments.** At the recent National Safety Council Congress and Expo, the Deputy Directory of OSHA's Directorate of Enforcement Programs also announced plans to revise the NEP on combustible dust for future release. (The combustible dust NEP went into effect in March 2008.) We will continue to monitor OSHA activity on this issue.

**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 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 Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities ("NFPA 664") and the 2019 edition of the NFPA General Standards 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.

## OSHA Guidance on Online Training

In a recent standard interpretation letter, OSHA acknowledged that while online computer-based training can be part of an effective safety and health training program, it must be coupled with interactive and hands-on training components. Employees must be able to ask questions and receive responses from a qualified trainer in a timely manner. Online training that provides no interaction or delayed or limited interaction between the trainer and trainee does not comply with OSHA worker training requirements. Additionally, the employer must provide sufficient hands-on training to allow employees to interact with equipment and tools in the presence of a qualified trainer so that the trainer can assess whether the employees have mastered the proper techniques. Online training that lacks a hands-on training component does not comply with OSHA worker training components.

## OSHA Guidance on Recording "Work-Related" Injuries

In a recent standard interpretation letter, OSHA discussed the "personal tasks" exception to recording workplace injuries. Under the "personal tasks" exception, an employer is not required to record an injury or illness that: 1) is solely the result of an employee doing a purely personal task (unrelated to his/her employment) at the establishment; and 2) occurs outside of the employee's assigned work hours. An employer must meet both requirements for the exception to apply. In the standard interpretation letter, OSHA addresses a question from an

employer on whether an employee who cut himself while sharpening a personal pocket knife in a Company vehicle during his lunch break fell under the personal tasks exception. OSHA responded that because lunch breaks are considered "assigned working hours" for recordkeeping purposes, the employer could not establish the second element of the "personal tasks" exception. Therefore, the injury was "work-related" and recordable.

## EMPLOYMENT LAW

***Prepared by Wimberly & Lawson, P.C.***

**Having Trouble with Aggressive Federal Investigators?**

**Recent Developments.** It is not uncommon for many employers and their attorneys to complain that they are harassed by overly aggressive federal investigators, some of whom appear to be following prior administration policies that are no longer applicable.

**Background.** In October, Cheryl Stanton, Administrator of the Department of Labor's Wage and Hour Division, addressed just this issue. She acknowledged there was a common complaint that some field investigators are ignoring the Trump Administration policies and instead advancing Obama-era strategies that are now outdated. In such situations, Stanton advised employers or their representatives to contact their district office director or to "flag it for the national office, and we can take a look and make sure that things are being applied correctly." Stanton also emphasized that employers are free to "run it up the chain," and stated that: "We are trying to look at the best way to become one Wage and Hour Division instead of 54 district offices." She noted that the division is in the process of retraining some investigators and reviewing the field operation handbook.

In a related development, many expect the new Secretary of Labor, Eugene Scalia, to direct new policy changes under a unifying but different interpretation of what constitutes fair Labor Department enforcement. The result may be memos to regional staffs requiring more national office oversight of major cases to guarantee the agency's litigation resources are properly engaged.

**Federal Agencies Must Post All Guidance on Their Website**

**Recent Developments.** Federal agencies must post all guidance on their website by next February or such will be considered rescinded. Last month, this newsletter reported that President Trump, on October 9, signed two executive orders to reduce the impact of agency guidance that had become a back door means of regulation. Agencies are supposed to review all their federal guidance documents and rescind those no longer in effect. The Office of Management and Budget has given agencies until February 28, 2020 to list all their operative industry guidance documents and post them to a single departmental website.

**Background.** In a related development, the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) announced that they, too, will meet these requirements, even though as independent agencies, they are outside the normal requirements.

Guidance from federal agencies is a doubled-edged sword to industry. On the one hand, many administrations have used such guidance to change the law without going through the normal notice and comment period, but on the other hand, some in industry like whatever advice they can get on compliance requirements of complicated legal issues. The new executive order will definitely promote transparency and consistency by requiring such postings to a central website.

**EEOC Pay Equity Data Collection**

**Recent Developments.** As reported in this newsletter last month, a federal judge in the District of Columbia has ruled that the EEOC had to implement its requirement that employers file certain pay equity data as part of the EEO-1 Component 2 filing due on September 30 of this year.

**Background.** The EEOC has already announced that the pay equity data component will not be required after this year, but there is still ongoing litigation as to the completion of the requirement for this year. The EEOC has

reported that approximately 81% of employers met the filing requirement of the pay equity data as of October 28, 2019. Plaintiffs in the ongoing litigation have contended that the pay data requirement should remain open until over 98% of businesses with 100 or more workers have submitted their pay equity data. The EEOC contends that sufficient filings have been made to close the first-time requirement. On October 29, the same federal judge ruled that the EEOC must continue to collect the pay data from employers with 100 or more workers. The rationale was that the agency had previously left the collection period open past the deadline, so now the judge wants the EEOC to at least collect the average response rate it calculates for those who submit data within the graces period rather than the normal deadline.

The ruling directs the EEOC to keep the filing period open until similar to the manner it has in the past, so that the federal judge can determine when the EEOC's responsibility to collect the pay equity data ceases. The court order said the EEOC "must continue to take all steps necessary" to complete the data collection by January 31, 2020. This suggests the possibility that there may be follow-up with those employers with 100 or more employees that have not yet filed the pay equity Component 2 Report. However, there are no automatic fines or penalties for not filing.

## Employer Toolkit for Drug Policies

**Recent Developments.** The National Safety Council has published an Employer Toolkit for drug policies and issues, which is very informative and comprehensive.

**Background.** The Toolkit furnishes an employer an excellent "checklist" of various items to consider, including such things as how opioids affect tolerance and ultimately lead to addiction, how to confront an employee, sample employee buy-in approaches, sample policies, and the like. The policies have recommended balancing the safety needs of the employer and workers' health, and suggest the following components:

- Statement of the purpose and scope of the program.
- Definition of what constitutes misuse, including alcohol and all forms of impairing drugs, prescribed, over-the-counter, legal, illegal, synthetic or otherwise.
- Statement of who is covered by the policy and/or program.
- Statement describing under what circumstances drug or alcohol testing will be conducted, including confidentiality of test results.
- Procedures to ensure fair testing process (confirmation testing, use of medical review officers, worker protections against retaliatory testing).
- Training for employees supervisors, and others in identifying impaired behavior and substance use.
- Employee education (e.g., a substance-free awareness program).
- Procedures for dealing with impaired workers.
- Assistance for those who voluntarily seek help for impairment issues.

For further information, go to www.NSC.org/opioidsatwork.

## Court May Let Trump Cancel DACA

**Recent Developments.** The U.S. Supreme Court heard arguments on November 11, 2019, as to whether President Trump could rescind the Deferred Action for Childhood Arrivals Program, commonly known as DACA.

**Background.** Based on questions and comments made by the justices, many commentators suggest that we may be looking forward to another 5-4 decision, with five of the justices allowing the President to cancel the program. One of the justices, Chief Justice Roberts, suggested that he saw DACA as illegal from the start, while another justice, Justice Brent Kavanaugh, suggested that he was satisfied with the explanation for the cancellation. The other justices like Justice Sotomayer said the President had told DACA-eligible people "that they were safe under him and that he would find a way to keep them here."

Following the hearing, the President suggested that a ruling in his favor would force Democrats to negotiate a way to keep the DACA recipients in this country. President Trump tweeted: "A deal would be made with Dems for them to stay!" Currently, more than 660,000 people have DACA status. A vast majority of these DACA recipients are currently employed in the U.S.