February 2019 Regulatory Update

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood and Composite Wood Products MACT

Recent Developments. On December 13, 2018, SLMA, AF&PA and other industry partners met with EPA to discuss the potential rulemaking. Among other topics, the industry coalition is engaging with EPA to discuss work practice standards that are flexible and reasonable for major source lumber producers.

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.

Climate Change Regulations

Recent Developments. On December 6, 2018, EPA issued a Proposal to revise the regulations governing greenhouse gas emissions from new coal-fired power plants. The Proposed rule would do away with the current requirement (established during the Obama Administration) which strictly limited potential greenhouse gas emissions from newly constructed power plants. The Proposal is expected to generate strong resistance from the public and environmental groups. Interestingly, there are no current plans to build any new coal-fired power plants in the U.S. at this time.

In this proposal, EPA, in accordance with the April policy issued by Administrator Pruitt on biomass (discussed in the section below), treats biomass derived from "responsibly managed" forests as carbon neutral. While "responsibly managed" is not defined, EPA references ensuring that forest biomass is not sourced from lands converted to non-forest uses, which echoes the bipartisan language enacted by Congress in both the Consolidated Appropriations Act for FY17 and the FY 18 Omnibus Appropriations Act.

Biogenic Carbon Emissions

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

Proposed SSM SIP Call Rule

Recent Developments. None. 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. 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, as a result of the court ruling discussed below. 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.

On March 6, 2018, the D.C. Circuit issued a revised opinion which clarified the factors that should be considered, but not treated as dispositive, when evaluating whether a secondary material should be treated as a "solid waste." The decision affords greater flexibility to industry when deciding whether to burn secondary materials as fuel.

Revised Ozone Standard

Recent Developments. None. On August 1, 2018, EPA informed the Court that it will not proceed with the reconsideration of the 2015 Rule but will instead push ahead with an expedited review of the 2015 standard as part of the previously scheduled 5-year review, which is set to conclude in October 2020.

On September 14, 2018, the D.C. Circuit issued a ruling that voided portions of EPA's Implementation Rule related to measures that States must take to comply with the 2008 ozone standard. This Ruling creates considerable uncertainty for States going forward. It is likely to also complicate efforts by EPA to rely on the methods previously laid out in the 2008 implementation plan as it develops an implementation rule for the 2015 standards.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments.

- On December 11, 2018 EPA issued its proposed replacement of the 2015 WOTUS Rule which established the 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).

- EPA will accept comments on the Proposal for 60-days after its publication in the Federal Register. It is expected to be fiercely opposed by numerous States and environmental groups and will likely be immediately challenged in court if/when it is finalized.

- 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 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.

- On February 28, 2018, the Sixth Circuit lifted its previously issued nationwide Stay of the WOTUS Rule. This move was expected after the recent Supreme Court ruling discussed below. The removal of the Stay allows the Rule to take effect in any jurisdiction that has not already been issued a Stay by a district court, e.g., 13 states in upper Midwest and Northwest. Second, litigation will be splintered across the U.S. going forward which will likely create additional disparities regarding the impact of the Rule among states.

- On January 22, 2018, the U.S. Supreme Court ruled that challenges to the Obama-era WOTUS Rule, defining the federal government's authority under the Clean Water Act, belong at the district court rather than appellate court level.

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 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.

On August 3, 2018, EPA issued a letter stating that it now intends to commence the reconsideration of its prior decision to partially disapprove the proposed water quality standards for the State of Washington.

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. On 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. None. 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.

Reminder to Post OSHA 300A Annual Summary

At the end of each calendar year, all covered employers must review their OSHA 300 Logs (or equivalent form) to ensure that they are complete and accurate and must correct any deficiencies. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, all covered employers must also create an annual summary of the injuries and illnesses using the OSHA Form 300A Summary or equivalent form. The OSHA 300A Summary must be signed by a company executive. A "company executive" is defined as: 1) an owner of the company (only if the company is a sole proprietorship or partnership); 2) an officer of the corporation; 3) the highest-ranking company official working at the establishment; or 4) the immediate supervisor of the highest-ranking company official working at the establishment.

The OSHA 300A Summary must be posted no later than **February 1, 2019** and must remain posted until **April 30, 2019**. Employers must create and post the OSHA Form 300A Summary even if there were no recordable injuries. This posting requirement is separate from the requirement to electronically submit OSHA Form 300A data to OSHA under the electronic reporting rule, which will be discussed below.

Amputation

Recent Developments. None.

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. 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 complete a Dust Hazard Analysis ("DHA") 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.

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. Beginning in 2019, the deadline for employers to electronically submit OSHA Form 300A injury and illness data to OSHA will be **moved up from July 1 to March 2**.

The OSHA Injury Tracking Application ("ITA") currently is accepting Calendar Year 2018 OSHA Form 300A data. The deadline for covered employers to electronically submit the OSHA Form 300A data is **March 2, 2019**. The OSHA ITA and additional information regarding the electronic reporting requirement are available at: https://www.osha.gov/injuryreporting/index.html.

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. All covered establishments were required to submit data from their 2016 OSHA Form 300A to OSHA by December 30, 2017. The final rule required 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 recently announced that it will not accept OSHA Form 300 and Form 301 data at this time.

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/.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Appeals Court Adopts Obama NLRB Joint Employer Standard

Recent Developments. Joint employment has probably been the most talked and written about subject in labor and employment law circles in recent years. It is so important that both the National Labor Relations Board (NLRB) and the Department of Labor (DOL) are attempting to draft regulatory definitions. It affects whether one company is liable for another company's employment relationships, whether an employer has to bargain with a union representing direct employees from another company, whether a union with a primary dispute at another entity can picket the joint employer's establishments, and a host of other labor and employment law ramifications. Its effects go beyond employment matters to include the potential for tort and contract liability, including, but not limited to, user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships.

Background. The newest development occurred on December 28, 2018, when the United States Court of Appeals for the District of Columbia Circuit adopted the NLRB's ruling that it would consider a putative joint employer's reserved right to control the workers at issue, as well as any indirect control exercised over the workers, as among a number of factors relevant to determining joint-employer status. Browning-Ferris Industries of California, Inc. v. NLRB, Nos. 16-1028, 16-1063, 16-1064. The appeals court upheld the right-to-control element of the NLRB's joint employer standard as meeting the standards of the common law, as the common law permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment. While the appeals court upheld the Obama-era NLRB's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over another entity's employees' terms and conditions of employment, but the appeals court nevertheless remanded the case to the NLRB to confine its consideration of indirect control consistently with common-law limitations.

The fact pattern creating the issue arose when *Browning-Ferris* entered into an exclusive service contract with a temporary labor services firm that staffed a plant. The temporary labor services firm employed its own on-site managers and supervisors, but Browning-Ferris reserved certain rights in the temporary labor services agreement.

In remanding the case back to the NLRB, the appeals court found problems in applying the indirect control factor within the relevant common-law boundaries that prevent the NLRB from encroaching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. That is, to perform the joint-employer analysis, the relevant forms of indirect control must be those that share or co-determine those matters governing essential terms and conditions of employment. By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status. For example, use of a cost-plus contract is a frequent feature of third-party contracting and subcontracting relationships. Further, the NLRB provided no blueprint for what counts as "indirect" control, as not everything conveyed through an intermediary implicates the essential terms and conditions of work. For example, routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis. Whether *Browning-Ferris* influences or controls the basic contours of a contracted-for-service - such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers - would not count under the common-law. The legal standard enunciated by the appeals court is that the joint-employer's control, whether direct or indirect, exercised or reserved, must bear on the "essential terms and conditions of employment" to be significant for joint-employment purposes, to distinguish that situation from routine components of a company-to-company contract.

The appeals court also states a second reason for the remand to the NLRB, noting the NLRB's holding that even if it finds the common-law would deem a business to be a joint-employer, the Board will also ask "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining" before finding joint-employer status under the Act. In other words, the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status under the Act.

There is some significant history in the *Browning-Ferris* case, including that it was overturned by the NLRB itself in the *Hy-Brand Industrial Contractors* case decided by the Trump-era NLRB in December of 2017. In *Hy-Brand* (a case handled by the Wimberly Lawson firm), the NLRB expressly overruled its *Browning-Ferris* decision and announced that a finding of joint employer status would require: (1) proof that the alleged joint-employer entities have actually exercised joint control over essential employment terms (rather than merely having reserved the right to exercise control); (2) the control exercised must be direct and immediate (rather than indirect); and (3) joint-employer status will not result from control that is limited and routine. However, due to an Inspector General report that one of the Board members improperly sat on the *Hy-Brand* case who was a shareholder in a law firm that represented the temporary employment agency before the Board in the *Browning-Ferris* case, the NLRB vacated its *Hy-Brand* decision and announced that the overruling of the *Browning-Ferris* decision was of no force and effect.

In addition to the ruling itself, the appeals court ruling in *Browning-Ferris* applied a rationale giving the courts, not the NLRB, the full right to determine the common-law application of joint employment. The appeals court finds that the content and meaning of the common-law such as the joint-employment issue is a "pure" question of law which the court is entitled to determine with the resolution requiring no special administrative expertise that a court does not possess. The appeals court also indicates that a court has the same independent right to determine independent contractor status as it does to determine the joint-employer inquiry, although the standards for independent contractor and joint employer are slightly different.

There is much significance in the rationale for the ruling, as it suggests that the courts, at least the District of Columbia Circuit Court of Appeals, will independently review whether a joint-employment relationship has occurred, without regard to the expertise of the agency, in this case the NLRB, and the court will apply its own definitions or applications. This rationale thus suggests that the NLRB will have a much more difficult time enacting and enforcing a regulation dealing with the definitions of joint employment, as the definition will be determined under the common-law and independently determined by a court, without regard to the NLRB's interpretation.

Editor's Note : The next steps in the joint-employer issue are quite confusing. The NLRB could simply render a decision in a pending case setting forth a different standard, which itself would create a potential for a court of appeals review of the issue, perhaps outside of the D.C. Circuit, and the D.C. Circuit's ruling would not be binding. Ultimately, it might go to the U.S. Supreme Court. In addition, the NLRB could implement a regulatory definition allowing indirect control to be considered but alone would not be sufficient for joint-employment status.

In any event, the discussion set forth in these cases and summarized in this article should be considered in a company's contract with other entities who provide their own employees. Whatever the various factors are relevant evidence or what standards will be determinative, is not totally clear at this point. At least, employers have a pretty good idea of the arguments that will be made.

Similar issues are pending at the U.S. Department of Labor (DOL), as the DOL is considering the possibility of its own regulation on the joint-employment issue.

White Worker Gets Trial for Harassment

Recent Developments. We all know that there are certain "buzz words" that often lead to harassment issues and problems. Most of the buzz words are those used in harassment cases brought by minorities and females. In a recent Georgia case, however, a white employee brought a harassment/retaliation case because of such a buzz word allegedly used against white employees. *Bland v. Sam's East, Inc.,* No. 4:17-CV-190 (M.D. Ga. 2019).

Background. Sam's Club (a subsidiary of Walmart) terminated a white employee for being rude to an assistant manager. The employee had previously reported that an African-American co-worker called him a "dumb redneck/hillbilly." While no disciplinary action was taken against the African-American worker, the white worker approached the manager and told him that he would have been fired immediately if he had used the "N" word during his confrontation with the African-American worker.

The district court judge rejected the contention that the white worker couldn't have reasonably believed his complaint of race-based favoritism towards the African-American amounted to protected activity under Title VII. Although Sam's got summary judgment on the white worker's claim that his discharge was motivated by his race, a federal judge ordered a trial on the issue whether the white worker was the victim of retaliation for complaining about racial harassment.

Editor's Note: This case is another example as to why employers should take harassment complaints very seriously. The author remembers his own experience trying a case in which a male employee in a virtually all-female sewing plant complained he was being sexually harassed by his female supervisor, who was older and quite attractive, but the plant management viewed the incident so lightly nothing was done. When the male employee was later laid off in a reduction of force, he brought a lawsuit for retaliation claiming that his layoff was motivated by his complaints of sexual harassment. The suit was brought against both the company and the female supervisor. Although the jury returned a verdict for the plaintiff, no damages were awarded against the company because the plaintiff had immediately found another job. There was an award against the female supervisor, however, of $1.00 (you read that right). The author was considered a hero since no monetary liability was found against the company or the supervisor, but later the plaintiff's attorney recovered her attorney's fees for getting a plaintiff's verdict from the jury.

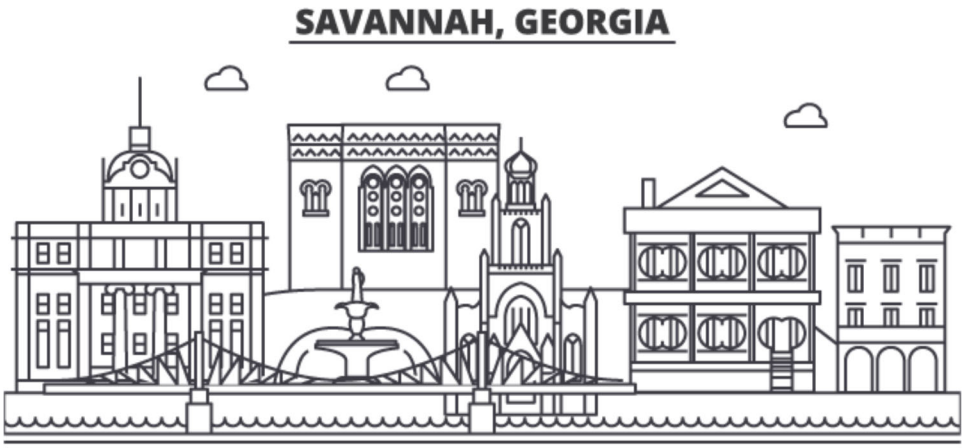
Drones Now Being Used By OSHA

Recent Developments. The Occupational Safety and Health Administration (OSHA) started using drones during 2018, although the number of inspections in which drones have been used is relatively small. Use of the drones by OSHA is likely to expand, but currently are most often used following accidents at work sites considered too dangerous for OSHA inspectors to enter.

Background. OSHA has gone so far as to direct each of its ten regions to designate a staff member as program manager for the unmanned aircraft program. An OSHA memo sets forth plans as to how OSHA will use drones, including most importantly, the fact that the employer must agree.

Employers should definitely consider whether to agree to OSHA's use of drones, as drones are highly effective, giving OSHA inspectors a broader and more detailed view of the facility. Even when an inspection is limited in scope, use of the drones by OSHA can lead to additional violations being found that are in plain sight. Further, the drones themselves raise safety issues including the possibility of causing damage to processes or trade secrets.

Employers have the right to require OSHA to obtain an inspection warrant before entering or expanding an inspection. It is usually better to at least attempt to negotiate the scope of the inspection with an OSHA inspector. However, employers have the right to and in many cases should resist an unreasonably broad inspection, in light of OSHA's search warrant cases that have been successfully litigated by the Wimberly Lawson firm and upheld by the Eleventh Circuit Court of Appeals. *USA v. Mar-Jac, Inc.,* No. 16-17745 (11th Cir., 2018).



BOOK YOUR ROOM FOR THE 2019 SPRING MEETING!

March 6-8, 2019
Hyatt Regency Savannah
For reservations, call (800) 233-1234 and mention "SLMA" to receive the discounted rate of $227 per night.

Agenda-At-A-Glance

Wednesday, March 6
6:00 PM – 9:00 PM: "Wood. It's Real" Fundraising Event

Thursday, March 7
10:00 AM – 12:00 PM: SLMA Board of Directors Meeting (Open to all members)
1:00 PM – 4:30 PM: Industry Updates
5:00 PM – 7:00 PM: Trade Expo & Reception

Friday, March 8
7:00 AM – 8:00 AM: Networking Breakfast
8:00 AM – 12:00 PM: Industry Updates

Registration information to follow! Please contact Alexis Sivcovich at (770) 631-6704 with any questions.