January 2019 Regulatory Update

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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, log into your member profile on www.slma.org.

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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.

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.

The proposed "Affordable Clean Energy Rule" is much less prescriptive and burdensome on the power industry than the Clean Power Plan and would require only that states develop and submit to EPA, within 3 years, technology-based plans to reduce greenhouse gas emissions from existing coal-fired power plants by improving their efficiency. States would have flexibility in determining the actual limits. This directive is similar to the initial phase of the Clean Power Plan but offers states much more flexibility. It also does not include additional phases of emission reductions that would build on to the initial phase as the Clean Power Plan would have done.

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.

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. 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.

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.

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 (see below). The industry group met with EPA recently to discuss potential fixes to the Rule.

On May 2, 2018, the Sierra Club filed a Petition for Panel Rehearing with the D.C. Circuit seeking rehearing of the court's March 16, 2018, SSM opinion discussed below. Petitioners are seeking only rehearing by the same panel, not by the entire en banc court. Sierra Club argues three points: (1) EPA did not justify why it could set work practices for the entire category of boilers (rather than only that subset of boilers that cannot measure emissions); (2) EPA's startup work practice standard is flawed because it does not require clean fuels; and (3) EPA's shutdown work practice standard is flawed because it does not require clean fuels. The Court has asked EPA and other parties to respond to the Petition by May 29, 2018. A decision is usually made on whether to hear the request within a month after pleadings are filed.

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.

Background. In the related-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 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.

On February 7, 2018, EPA published its final 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. As with the prior proposed rule, the burning of these rail ties is subject to certain limitations set forth in the final rule.

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 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. 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 Form

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 the 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 the 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 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.

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. None. On July 30, 2018, OSHA proposed eliminating the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301, though they will still be required to electronically submit OSHA Form 300A. OSHA recently announced that it will issue a new final rule regarding electronic reporting requirements in June 2019.

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/

Walking-Working Surfaces and Fall Protection Standards

Recent Developments. None. The deadline for installing a cage, well, ladder safety system, or personal fall arrest system on existing fixed ladders that currently do not have any fall protection was **November 19, 2018**. Violations of the fall protection standard remained the most cited violation in Fiscal Year 2018.

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. 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**.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Should My Company Use Arbitration Agreements

Recent Developments. Parties to contracts in recent years overwhelmingly favor the use of arbitration rather than court litigation to resolve disputes. The general thinking is that arbitration is quicker, cheaper, more private, and avoids the potential of "runaway" juries. The court system seems to like arbitration as well, as it lessens their case load and supports other public policies. The trend began expanding to employment law some 20 years ago, and the Economic Policy Institute reports that 56% of non-union private-sector employees are subject to mandatory individual arbitration procedures, covering some 60 million American workers. In light of a U.S. Supreme Court ruling in 2018 in *Epic Systems Corp. v. Lewis*, employers using arbitration are likely to include class and collective action waivers in their arbitration agreements.

Background. The *Epic Systems* case removed an issue raised by an NLRB ruling during the Obama Administration, prohibiting class and collective action waivers as interference with employee concerted activity recognized in Section 7 of the National Labor Relations Act. The *Epic Systems* case resolved this problem by ruling that the Labor Act did not guarantee employees the right to pursue group legal action against their employer, and further found that such agreements did not displace the importance given to arbitration under the Federal Arbitration Act.

If arbitration is so wonderful, and "everybody is doing it," should my company adopt individual arbitration agreements/policies? Well, the answer is not so simple. First, consider the "MeToo" movement which has implemented publicity campaigns against arbitration of sexual harassment claims and the confidentiality of the process. At Google and certain other companies, employers have made arbitration optional for individual sexual harassment claims, in response to these protests. At certain law schools around the U.S., law students have mounted publicity campaigns against law firms that use mandatory arbitration agreements, with protests so strong that some law firms have terminated or modified their mandatory arbitration policies. Uber has responded to protests by allowing employees to opt-out of arbitration agreements if they do not want to use arbitration. Some companies use a hybrid approach of allowing employees a short window of time to opt-out of arbitration, such as 30 days, before being considered to have agreed to the provision.

Another problem developed at Uber concerning its arbitration policies that require individual arbitration without class or collective actions. Uber drivers responded to such approaches by filing some 12,500 demands for individual arbitration, particularly since Uber had agreed in its arbitration agreement to pay the arbitration filing fees.

Despite these well-publicized situations, the vast majority of all employers have been able to implement and use individual arbitration agreements without protest from workers. Indeed, there are a lot of advantages to the worker to have arbitration, including a quicker and cheaper process. Some worry the process can become so quick and cheap that more workers will in essence "sue" their employer in arbitration. There is little evidence to support this result, however, and the use of arbitration continues to expand.

Indeed, the ability to limit class or collective actions and to limit adverse public exposure, has a lot of appeal, even absent the quicker and cheaper process. Arbitration with waiver of class or collective actions is something to be seriously considered by employers who face a great deal of litigation, and/or concerns about class or collective actions in the future.

Another possible and more controversial question is whether employers can enter into agreements with their employees to waive class and collective actions without arbitration being a part of the process. In *Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017), the court ruled that class action waivers were enforceable in employment cases, even if not part of an arbitration agreement. This result seems to be supported by the recent Supreme Court ruling in *Epic Systems*, where the Court ruled that the Labor Act's protection of "other concerted activities" did not extend to a substantive right to pursue group legal action.

Nevertheless, requiring employees to sign documents waiving class or collection actions without arbitration is legally controversial, as the Sixth Circuit Court of Appeals recently noted in distinguishing that situation from such waivers in connection with arbitration agreements. The Sixth Circuit has suggested that they may not allow class and collective action waivers in the case of wage-hour cases absent a provision for arbitration. Compare *Gaffers v. Kelly Services, Inc.,* 900 F.3d 293 (C.A. 6, 2018) (considerations change when an arbitration clause is involved) with *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (C.A. 6, 2014) (because no arbitration agreement is present, there is no countervailing federal policy that outweighs the policy articulated in the FLSA allowing collective actions).

In addition to strategic and practical considerations, there are numerous somewhat complicated and technical legal issues in drafting and implementing an individual arbitration agreement. One problem is that state contract law requirements must be met as to when an agreement or contract has been made. States generally cannot set forth separate standards for arbitration agreements, as general rules of state contract laws are applicable. Thus, in some states an approach is as simple as including the provision in an employee handbook, together with a sign-off page indicating that the arbitration provisions are contractual, and the other provisions of the handbook are not, may be enough. Having arbitration or waiver provision on employment applications seems to be a good way of implementing the process, at least as to new hires. It is possible that a short summary of the provisions could be contained in the written documents, giving the employee the right to review the entire arbitration agreement upon request, or having it posted somewhere.

Issues can also arise as to what to do with employees who refuse to sign the agreement, if a signature process is used. The issues are similar to those requiring an employee to sign a non-compete or confidentiality agreement. Do you terminate someone who refuses to sign, deny them a pay increase until they sign, or what? In this regard, the state consideration laws must be met in terms of reaching an agreement, and continued employment is not consideration to support a contract in all states.

In addition to the need to meet the requirements of a "contract," many other numerous technical and legal issues are presented. For example, an appropriate arbitrator or arbitration service has to be considered. The arbitration services have different rules to be considered, and some of their filing fees are significant. Similarly, many employers design their arbitration agreements with limited discovery provisions and allow for summary judgment proceedings without a hearing. It does seem that an arbitration agreement may not waive substantive rights under the various laws that are addressed in arbitration, such as the right to receive in some cases punitive or compensatory damages, recover attorney fees in successful cases, and probably the right not to have to pay filing fees or costs in excess of those that would be assessed in court litigation.

In short, there are many, many issues to address, and use of arbitration is not a "one size fits all" document. While standard or common agreements furnish a good starting point, each company may have its own particular situation, which may vary somewhat by state, in setting up appropriate arbitration procedures and provisions.

For those employers wishing to use employee agreements to avoid legal problems, who don't want to go so far as to use individual arbitration or class or collective action waivers, other possibilities include agreements to waive jury trials, or to set forth shorter statutes of limitations than allowed under various statutes. These type provisions are widely enforced in court, and should be considered.

Union Use of Debit Cards to Collect Dues

Recent Developments. With the growing number of right-to-work states, and the new Janus Supreme Court ruling applying the right-to-work concept to governmental employees, unions are developing new tactics to maintain their income through dues collection. Some locals of a very aggressive national union, the Service Employees International Union, have introduced a pre-paid debit card sponsored by it and ADP, which allows workers to authorize ADP to deposit their paychecks onto the card so as to route their dues to the union.

Background. The cards can also be used to store government benefits, pay bills and cash checks, and allows workers to have a form of a bank account. This effort is particularly being used in the public sector where workers now have the option of avoiding union dues and fees. One wonders whether the tactic will be expanded among other unions and in other situations to increase the income to unions and to further their organizing and political efforts.

Learn About Government Press Releases

Recent Developments. The Obama Administration followed a policy promoting "public shaming" of employers accused of law violations, as a deterrent to discourage violations. These policies appear to have decreased but are still continuing under the Trump Administration. A recent example shows why employers need to be careful in their settlement agreements with government agencies, as to how press releases by the government are handled.

Background. In a recent ruling, Nebraska Beef reached a settlement agreement with the Department of Justice Office of Special Counsel (now called Immigrant Employment Rights). In reaching the settlement, the company had denied any violation of the immigration laws, and their apparent approach to the settlement was to avoid any admission of liability by the company. Nevertheless, the Justice Department issued a press release stating that its investigation "found" the company unlawfully demanded immigration documents from job applicants because of their citizenship status. The meat packer claimed the press release inaccurately characterized the company's settlement, and thus, that the Justice Department had breached the settlement agreement.

Even though there were never any findings of liability under the Immigration and Nationality Act, and even though the apparent purpose of the settlement was to avoid any admission of liability, the court found there was no breach of the settlement agreement. U.S. v. Nebraska Beef, Ltd., No. 17-1344 (8th Cir., 2018).

The bottom line is if employers wish to settle with a government agency and avoid an adverse press release, they should inquire about the agency's precise intentions before settling a case and secure some assurances of what is said. A dissenting judge in the case would have ruled that the agency had an obligation to describe the settlement accurately.

More Employers are Lowering Hiring Standards

Recent Developments. Some estimate that over the past year a quarter of America's employers have made significant changes to their hiring standards, such as skipping drug tests or criminal background checks or removing preferences for diplomas. National employers may vary their hiring standards based upon the location involved. Only a quarter of entry-level jobs now ask applicants for three or more years of experience, compared to a higher percentage previously.

More Employers Are Offering Medical Clinics

Recent Developments. Kiplinger reports that providing workers with medical care on the job is expanding significantly. By 2016, 40% of large employers had medical clinics on-site or nearby, compared with 25% in 2013. Most facilities are primary care and wellness clinics that charge little or nothing. While most are run by contractors, up to 30% of them are company run. Smaller employers are cooperating to offer services at shared clinics.

ObamaCare Ruled Unconstitutional

Recent Developments. On December 14, 2018, a Texas federal judge ruled that the Affordable Care Act (ACA) is unconstitutional.

Background. The basis was that the ACA's individual mandate is no longer binding, because Republicans repealed its financial penalties as part of the 2017 tax reform legislation. The Supreme Court had previously upheld the ACA by calling the mandate a "tax" that was within Congress's power, but the "tax" was reduced to zero by the 2017 tax reform bills. The federal judge also found that since Congress had said the individual mandate was crucial to the structure of the ACA, then all of the ACA must fall along with the mandate.

The ruling allows the ACA to currently remain in effect, and the case will undoubtedly be appealed and may be reversed. Even in the absence of a reversal, there will be a lot of interest on both sides of the aisle to work out a compromise resolution as public opinion has swung in favor of many aspects of the ACA.

BOOK YOUR ROOM FOR THE 2019 SPRING MEETING!

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Agenda-At-A-Glance

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

Thursday, March 7
8:00 AM– 9:30 AM: Leadership Advisory Committee Meeting
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.