January 2020 Regulatory Update

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood and Composite Wood Products MACT & RTR

Recent Developments. None. 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. The comment period on the proposed RTR will be open for 45-days once it is published in the Federal Register, which is expected shortly.

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 December 20, 2019, the President signed the 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.

Revised Ozone Standard

Recent Developments. None. On August 23, 2019, the D.C. Circuit issued an opinion that generally upheld the Obama era 2015 Rule that lowered the national air quality standards for ozone. This decision is expected to have limited long-term impacts since, on August 1, 2018, EPA informed the Court that it will push ahead with an expedited review of the 2015 standard as party 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 US"

Recent Developments. EPA has submitted a draft of the final rule to replace the 2015 WOTUS Rule (step 2 of the two-step "repeal and replace" plan) to OMB for internal review.

The final Rule to repeal (step 1 of the two-step "repeal and replace" plan) 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 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.

State Water Quality Criteria

Recent Developments. None. On July 24, 2019, EPA proposed to withdraw the previously instated federal water quality standards that it had imposed on Washington state. Once finalized, the state will have full control of setting water quality standards within its boundaries.

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 had given EPA 12 months to revise its decision. We understand that the Maine legislature is now considering the promulgation of its own water quality standards focused on the protection of Native American sustenance practices.

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

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

Recent Developments. None. 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 had 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.

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 USFWS' re-opening of the public comment period on a proposal to designate critical habitat in 9 counties in Mississippi and 1 county in Alabama for the Black Pine Snake. The species was listed as threatened in November 2015.

ESA Review of Tri-Colored Bat

Recent Developments. None. The U.S. Fish and Wildlife Service (USFWS) has initiated a 12-month review to determine whether to list the Tricolored Bat under the Endangered Species Act (ESA). The underlying rationale for the review is the decline of

the species population due to White Nose Syndrome (WNS). If the USFWS determines the bat is endangered, then habitat conservation measures similar to those proposed for the Northern Long-Eared bat would be likely. We will monitor the development of this potential rulemaking as it moves forward.

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

Recent Developments. The Court has cancelled the status conference that was previously scheduled for December. As noted below, the parties are still waiting on a decision from the Court.

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

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

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 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 the 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. 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 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.

Fall 2019 Unified Regulatory Agenda

The Federal United Agenda of Regulatory and Deregulatory Actions highlighted the following priority areas for OSHA in the upcoming year:

Lock-Out/Tag-Out Update: OSHA currently is analyzing comments submitted in response to its May 2019 request for information regarding the use of computer-based controls of hazardous energy. OSHA may also hold a stakeholder meeting and open a public docket to further explore the issue.

Mechanical Power Presses Update: OSHA plans to issue a request for information in July 2020 relating to updating the mechanical power presses standard, which is approximately 40 years old. Focus areas include the use of hydraulic and pneumatic power presses and technological changes.

Powered Industrial Trucks: OSHA plans to develop a proposed rule updating the OSHA standard on powered industrial trucks (e.g. fork trucks, tractors, lift trucks and motorized hand trucks), which relies on ANSI standards dating back to 1969. OSHA is currently analyzing comments submitted in response to its March 2019 request for information relating to the use, maintenance, training, and operation of powered industrial trucks.

Walking Working Surfaces: OSHA plans to issue a Notice of Proposed Rulemaking in April 2020 based on stakeholder feedback that provisions of the 2016 final rule are unclear. OSHA plans to clarify the requirements for stair rail systems to reflect OSHA's original intent and correct a formatting error.

Hazard Communication Standard Update: OSHA plans to issue a Notice of Proposed Rulemaking in January 2020 to align the OSHA Hazard Communication Standard with the latest edition of the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). OSHA incorporated the GHS into the OSHA Hazard Communication Standard is 2012, but there have since been several updates.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Pro-Management Rulings from the Labor Board

Recent Developments. The sole Democratic member of the National Labor Relations Board (NLRB), Lauren McFerran, reached the end of her term on December 16, 2019.

Background. Traditionally, the departure of a Board member triggers large numbers of rulings, particularly if the case has overturned existing precedent and so a new member does not have to start all over in reviewing pending cases. It is likely that the Board will continue to function with three Republicans for some time, but at some point in the future, there will likely be Democrats nominated to the Board as part of some type of compromise with other appointments. The Obama-era NLRB also functioned with three members of the Democratic Party for about eight months.

As of this writing, several encouraging rulings or developments were issued in December with pro-management implications. These rulings were generally by three-one margin, with the sold Democrat dissenting.

NLRB Changes Quickie Election Procedures

Recent Developments. One of the most debated, publicized, and contentious issues in employment law in recent years has been the NLRB "quickie election" rule, which only allowed 20 days or so between the filing of the union election petition and the election itself.

Background. Unions felt that shortening the time period for an election would increase their chances of success, while employers complained that there was no time to inform employees of the other side of the story. Employers cited to political elections and the lengthy time periods necessary for the voters to understand the issues.

In December, the NLRB announced more than a dozen changes to the quickie election procedures. The changes include clarifications to procedures prior to an election that better insure the opportunity for litigation and resolution of unit scope and voter eligibility issues. The changes also permit parties additional time to comply with the various pre-election requirements instituted in 2014. The Board issued the procedural changes as a final rule pursuant to its authority to change its ow representation case procedures. The final rule will be effective 120 days from the date of publication in the Federal Register, which is anticipated to be December 18, 2019. The NLRB's regulatory agenda says the Agency may roll out other amendments to the quickie election procedures next year.

Significantly, some of the changes extend the election process. All time periods will be calculated in business days, rather than calendar days under the quickie election rule. The dissenting Democrat on the Board states that: "With this rule, my colleagues claim the dubious distinction of becoming the first Board in the Agency's 84-year history to intentionally codify substantial delay in the representation case process, to the detriment of the mission of our Agency." Because of the importance of the new rule, it will be more fully discussed in a subsequent newsletter. In the meantime, please let us know if y9ou have any questions or want a copy of the new rule.

Employers May Restrict Use of Their Email System

Recent Developments. The NLRB has re-established the right of an employer to restrict employee use of its email system if it does so on a non-discriminatory basis. Caesars Entertainment, Inc., 368 NLRB No. 142

Background. This case reversed an Obama-era ruling that employees given access to the employer's email system had a presumptive right to use that system, on non-working time, for union or other concerted activities. In the current ruling, the Board stated that employees do not have a statutory right to use the employer's email and other information-technology (IT) resources to engage in non-work-related communications. The ruling indicates that employers may lawfully exercise the right to restrict the uses to which those systems are put provided that in doing so, they do not discriminate against union or other protected concerted communications. The Board in essence reinstated the rulings that existed prior to the Obama NLRB.

In doing so, the Board agree with business groups that employers have property and First Amendment rights to limit the use of their own email system. An exception will remain, however, for case "where an employer's email system furnishes the only reasonable mean s for employees to communicate with one another."

Employers May Discontinue Union Check-Off

Recent Developments. The NLRB also ruled in December that an employer's statutory obligation to check-off union dues ends upon the expiration of the collective bargaining agreement containing the check-off provision. Valley Hospital Medical Center, Inc., 368 NLRB No. 1369. The decision overturned an Obama-era ruling and returned the NLRB to the rule existing for over 50 years.

Background. This ruling can be very helpful to employers during contract negotiations, as unions often drag out such negotiations attempting to secure a more favorable resolution to the union. If employers have the right to cut off the collection of union dues, however, there will be much more pressure on the union to conclude negotiations so that dues collection can be restored. The ruling contemplates that employers can unilaterally stop such dues deductions without bargaining to impasse with the union, once the contract has expired.

Greater Confidentiality in Workplace Investigations

Recent Developments. Another NLRB December ruling dealt with workplace investigations, and the issue of whether an employer can have work rules requiring confidentiality during the course of such investigations. Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144.

Background. The Obama-era NLRB issued a decision requiring employers to prove, on a case-by-case basis, that the integrity of an investigation would be compromised without confidentiality. Employers often desire to have such confidentiality to preserve the integrity and privacy of such investigations, particularly involving sensitive harassment issues. Indeed, the Equal Employment Opportunity Commission (EEOC) encourages such confidentiality. The EEOC and the NLRB had actually met without success over resolving the issue between privacy and workers' rights to discuss job-related issues.

In responding to the argument of the importance of workers being able to confer with coworkers, the NLRB said any adverse impact of gag orders on an open investigation is "comparatively slight." The Board stated: "The rules at issue do not broadly prohibit employees from discussing either discipline or incidents that could result in discipline . . . Rather, it narrowly requires that employees not discuss investigation of such incidents or interviews conducted in the course of an investigation."

NLRB Approves McDonald's Settlements Thus Disallowing Joint Employer

Recent Developments. The joint employment issue is high on the agenda of the main employment agencies, including the NLRB, the Department of Labor (DOL) and the EEOC. While the joint employment issue has been litigated in a variety of forums, perhaps the most publicized forum was the NLRB case involving McDonald's, in which the Obama-era NLRB General Counsel contended that McDonald's and is franchisees were joint employers.

Background. The litigation continued for almost three years, and although a settlement agreement was reached, an NLRB administrative law judge denied motion to approve the settlement agreements. On special appeal to the Board, the Board remanded the case to the judge with the instructions to approve the settlement agreements. Applying various "reasonableness" factors, the majority found, contrary to the judge, that the settlement agreements are reasonable, they provide a full remedy to all affected employees, and accepting the settlement agreements would serve the policies of the Labor Act. Significantly, the settlements do not impost joint liability on McDonald's, as the liabilities are basically limited to the franchisees. Thus, under the settlement, McDonald's avoids any joint employer finding.

New DOL Rules Clarify When Payments May Be Excluded from the Regular Rate

Recent Developments. In the first update to these regulations in 50 years, the Department of Labor on December 18, 2019 published a Final Rule clarifying when payments—such as year-end bonuses—must be included in an employee's "regular rate" (i.e., pay divided by hours worked) for purposes of calculating overtime. The new rules take effect January 15, 2020.

Background. The Fair Labor Standards Act (FLSA) requires employers, among other things, to pay nonexempt workers one-an-one-half times their "regular rate" of pay for all hours worked over 40 in any work week. The old rules sometimes left employers in doubt about whether a payment should be included in that rate: a mistake could lead to expensive liability for back pay and liquidated damages, plus attorneys' fees if a private lawyer got involved on behalf of the employees. Doubts about whether the value of certain "perks" should be included often discouraged employers from offering them.

The new rules allow employers to exclude the value of the following in figuring the regular rate:

- parking benefits, wellness programs, certain onsite specialist treatments, gym memberships, fitness classes, discounts on retail goods, certain tuition benefits, an adoption assistance;
- cash payments made lieu of unused paid leave, including paid sick leave and paid time off;
- payments of certain state and local penalties;
- reimbursement for certain expenses such as for cell phone plans, credentialing (licensing) exam fees, membership dues, and travel (even if not exclusively for the employer's benefit) up to certain limits;
- certain signing and longevity bonuses;
- the cost of office coffee and snacks (!);
- certain discretionary bonuses; and
- contributions to certain benefit plans such as for accident, unemployment, or legal services, or for other events that could cause financial hardship or expense.

The final rule also clarifies that calling a payment a "bonus" won't necessarily make it so and provides helpful examples of payments that may lawfully be excluded from the regular rate. There are two other changes to existing regulations: one to eliminate the restriction that "call-back" pay must be infrequent and sporadic to be excluded, an a second to update rules regarding the "basic rate" that is sometimes an alternative to the "regular rate" and may apply in certain circumstances to payments made in certain overtime weeks to comply with local, state and Federal minimum wage requirements.

Human resources professionals, and employment lawyers, often remark that "no good deed goes unpunished." This was sometimes true with the regular rate, when an enterprising plaintiff's lawyer could argue that hourly sales clerks should have the value of their in-store discounts or parking added to their regular rate when overtime was calculated. These revised regulations bring much-needed clarity and predictability to the regular rate.

2020 SLMA & SFPA Spring Meeting & Expo

March 25-27, 2020

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Hotel Information

Hotel Monteleone
214 Royal Street
New Orleans, LA 70130

Reservations:
Call (504) 523-3341 and mention "SLMA" or "SFPA," respectively, by March 4, 2020 for the discounted rate of $199.00 per night.

Agenda At-A-Glance

Wednesday, March 25

6:00 - 9:00 PM	"Wood. It's Real" Fundraiser at The Napoleon House

Thursday, March 26

8:00 - 9:30 AM	SLMA Board Meeting (open)
10:00 -11:30 AM	SFPA Board Meeting (open)
1:00 - 5:00 PM	Industry Updates
5:00 - 7:30 PM	Trade Expo & Reception

Friday, March 27

8:00 - 9:00 AM	Networking Breakfast
9:00 - Noon	Industry Updates

Attendee Information

Name: _____

Company: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone: _____ Cell: _____

Email: _____

Register Me For The Following:

☐ **"Wood. It's Real" Fundraising Dinner at The Napoleon House - $325 per person**

☐ **Meeting Registration - $185 per person**

☐ **Expo Table- $250 per table**

Total: $_____

Payment Information:

☐ Check made payable to SLMA*

☐ Charge to: ☐ Visa ☐ Master Card ☐ AMEX ☐ Discover

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Please note that all registration fees should be sent to SLMA, P.O. Box 3630, Peachtree City, GA, 30269 or by fax at (770) 631-6720. Registration can also be completed online at www.slma.org.