July 2019 Regulatory Update

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Regulatory Reform

Recent Developments. On May 21, 2019, EPA Administrator Wheeler announced that he was directing the agency to initiate rulemakings that will ensure that "the agency balances benefits and costs in regulatory decision-making." Although the agency has long been required to complete cost/benefit analyses for rulemakings per prior Presidential Orders, this initiative will formalize such analysis with binding and judicially enforceable regulations. Wheeler has directed the heads of each office – air, water, solid waste, and chemical safety – to develop a media-specific notice-and-comment rulemaking on how benefit-cost balancing and analytical best practices will be applied under each statute, starting with the air office, which will propose a regulation "later this year."

Plywood and Composite Wood Products MACT

Recent Developments. SLMA and its industry partners have been informed by EPA that the agency will 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 is concerned that it will not be able to complete either task by the deadline unless it cuts back on its effort 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 products.

"Once In, Always In" Policy

Recent Developments. None. EPA has submitted a proposed rule to the Office of Management and Budget 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 source threshold and then opt out of the Title V permitting process (with respect to HAPs) and other programs directed at major sources only.

Climate Change Regulation

Recent Developments. None. 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. None. On February 14, 2019, the House passed the FY19 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, DOA 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. Although the litigation continues to be stayed indefinitely (see below), EPA has recently taken 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).

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.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. 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 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, 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 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 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.

Industrial Stormwater General Permitting

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

State Water Quality Criteria

Recent Developments. None. On April 8, 2019, EPA initiated a 30-day public comment period on its decision to reconsider its 2016 decision to partially disapprove the proposed water quality standards for the State of Washington. This action is being viewed as an indicator that EPA will not seek to impose the more stringent standards previously considered for tribal areas in that State.

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. 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. 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).

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

Recent Developments. The Court has scheduled a status conference for October 4, 2019; however, the scope of topics to be discussed at that time is unclear. As noted below, the parties are still waiting on a decision from the Court.

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

Background. On January 14, 2016, 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.

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 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 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 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/

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 have a Dust Hazard Analysis ("DHA") completed by a professional safety consultant by September 7, 2020. Companies considering

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.

Request for Information Regarding Lockout/ Tagout Standard

Recent Developments. OSHA is requesting information on a possible update to the Control of Hazardous Energy (Lockout/Tagout) Standard. The current Lockout/ Tagout Standard was last updated in 1989. OSHA is specifically interested in how employers are using control circuit devices including the types of circuitry and safety procedures being used; limitations of their use to determine under what other conditions control circuit-type devices could be used safely; new risks of worker exposure to hazardous energy as a result of increased interaction with robots; and whether the agency should consider changes to the Lockout/Tagout Standard that would address these new risks. Comments are due on **August 19, 2019**.

SLMA will submit comments with the National Association of Manufacturers (NAM) focusing on the following key issues of interest to the manufacturing industry:

1. Use of control circuit devices that provide for the exclusive control of employees performing maintenance and servicing are common in the manufacturing sector and are as protective as lockout/tagout.

2. In addition to control circuit devices, many types of machines in manufacturing are equipped with interlocks that involve multiple re-energization steps and that also should be permitted to be used, outside of lockout/tagout. For many of these machines, the interlock is designed to prevent the machine from engaging when any person or object is in the zone of danger. (According to NAM, this is not specifically addressed in the RFI but is of vital importance to the industry.)

3. Some states and other countries have eased lockout/tagout requirements as it relates to manufacturing. This point will be raised in comments, along with a discussion of the alternative methods permitted in various consensus standards.

4. A discussion of robotics, informing the agency of their use in manufacturing and safety features built into robotics.

The complete list of questions on which OSHA seeks input is available at: http://s3.amazonaws.com/public-inspection.federalregister.gov/2019-10247.pdf. Comments may be submitted to OSHA their comments electronically at https://www.regulations.gov; by fax at (202) 693–1648; or by regular mail to OSHA Docket Office, Docket No. OSHA–2016–0013 or RIN, 1218–AD00, Technical Data Center, Room N3653, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. All comments must reference Docket No. OSHA–2016–001.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Gig Workers to be Independent Contractors

Recent Developments. In an opinion letter issued by the U.S. Department of Labor (DOL) on April 29, 2019, DOL finds that workers getting jobs through smart phone apps and websites such as Angie's List are independent contractors and not employees of those platforms.

Background. The opinion indicates that such service providers are not working for the virtual marketplace, but working for consumers through the marketplace. Gig companies like Uber and even traditional employers outside of the gig economy can use this opinion letter as a potential defense when they have relationships with independent contractors or others they do not treat as employees.

It should be noted that this opinion letter is not a law or regulation, and only covers how the current administration will interpret the law. This letter makes changes from the Obama-era DOL, which considered most gig workers to be employees.

The opinion letter states that it is based on long-standing Supreme Court precedent, utilizing a six-factor test. Factors include permanency of the worker's relationship to the gig company, the amount of skill or judgment required for the worker's services, control the company exercises over service providers, and how much the service providers' work is tied to the primary purpose of the company. In discussing the control issue, the letter indicates that the company did not set a work quota, a firm schedule, or dictate how to perform the selected services, as service providers had the ability to set their own schedule. They could also take jobs through competitor platforms. The letter also indicated that the work a service provider performs is not integrated into the company's business, because once a client and a service provider are connected, the company's operation is effectively terminated.

The determination of employee versus independent contractor status is critical, as independent contractors do not have employment rights, benefits or tax withholdings. The business models of many companies are based on the independent contractor concept. Nevertheless, plaintiffs may continue to challenge a company's business model dependent on using independent contractors, and many states, like California, have rules more rigid than that of federal laws.

NLRB– Aggressive Agenda Positive Change

Recent Developments. The National Labor Relations Board (NLRB), through its Republican majority and aggressive General Counsel, Peter Robb, has publicized various positive changes, many of which add clarity or more even-handed decision -making to the NLRB.

Background. On May 22, 2019, the announcement indicates that the Board will consider rule-making in the following areas:

- A joint-employer standard.
- The Board's current representation - case procedures (the so-called "quickie" election rule).
- The Board's current standards for blocking chargers, voluntary recognition, and the formation of Section 9 (a) bargaining relationships in the construction industry.
- The standard for determining whether students who perform services at private colleges are employees.

It should be noted that rule-making is rare at the NLRB, but it offers certain advantages including the fact that rules once established are harder to reverse in a future administration. The quickie election rule during the Obama Administration is an example of recent rule-making.

It is not just in rule-making that the NLRB is having a major impact. The NLRB General Counsel, Peter Robb, has the ultimate authority of the position to be taken by the Board in litigation and whether to issue a complaint that would start the litigation process over an issue. The Obama-era NLRB overturned some 92 NLRB precedents, and the current General Counsel is anxious to reverse many of those rulings as well as set forth new favorable precedents. Some of the areas the General Counsel would like to address and change Obama-era precedent include changing union's power during contract negotiations, assessing employer arbitration agreements, the NLRB's standards for deferring to arbitration, issues pertaining to the discussion of workplace investigations, and those relating to unions' displaying the inflatable cartoon balloon known as "Scabby the Rat" at labor demonstrations. The General Counsel's office has advocated for changes to Board law to remove employers' obligation to deduct dues after a collective bargaining agreement expires; allow workers to revoke their dues authorizations when there is no contract in effect; and permit employers to stop making pension contributions when their collective bargaining agreement expires and pension fund documents indicate that payment should stop. Important new labor precedents have already been set overturning Obama-era rulings on workplace rules, employment classification, and micro-units.

DOL Moving Ahead on Regulatory Reform

Recent Developments. The U.S. Department of Labor (DOL) has been moving much more slowly than the NLRB in regulatory reform. Possible explanations include long delays in approving political appointments to the DOL, the cautious nature of Labor Secretary Acosta, and a controversy over Acosta's involvement in a decade-old plea deal while he was a federal prosecutor in Florida.

Background. It has been widely reported that White House Acting Chief of Staff Mick Mulvaney, who is the principal architect of the Administration's deregulatory agenda, has directly involved himself in DOL decisions so as to increase the deregulatory process.

At the top of the list are the new salary tests for overtime pay coverage; a proposal to clarify when employers can exclude worker benefits from the "regular rate" used in setting the overtime pay level for work beyond 40 hours; and the narrowing of the joint employment definition. Other priorities include more regulatory moves such as implementing the Trump 2017 Executive Order to improve the federal apprenticeship system and moving along completion of regulations designed to expand small-business health and retirement plans. Future plans include proposals to give employers more flexibility in how to compensate workers; modification of the Family and Medical Leave Act; revisions to how unions are audited; and more quality control of the federal-state unemployment insurance system.

Uber– Example of Individual Arbitration Issues

Recent Developments. Funny things happen when a company institutes an initial public offering (IPO), as Uber did during 2019. One of those things is that such companies often attempt to settle ongoing litigation, to make their IPO more attractive to investors. Uber did just that this year in connection with its independent contractor business model, and in the process becomes a "poster child" for individual arbitration along with its gig economy.

Background. Uber might be the largest employer in the world, if it were an "employer." Instead, its business model is to use independent contractor drivers, and it reportedly has some 3.9 million drivers globally. Such a situation resulted in many lawsuits claiming that the legal relationship was one of employment rather than independent contractor. In addition to its independent contractor business model, Uber also instituted a business model of requiring drivers to sign individual arbitration agreements in which class and collective actions are prohibited and all disputes with Uber had to be taken to individual arbitration.

Uber's business plan as to litigation thus prevented drivers from banding together in class actions in court, where there was a danger of each case possibly resulting in a ruling that might destroy the company's independent contractor business model. Arbitration, in contrast, does not set any legal precedent even if the rulings are adverse to the company.

In spite of the apparent benefits of arbitration to both companies and workers, history indicates that very few workers engage in individual arbitrations. However, organized groups of plaintiff's lawyers and workers brought a multitude of court actions against Uber, although Uber basically won almost all of these court actions by getting the cases dismissed in favor of individual arbitration, plaintiff's lawyers engaged in a new tactic to counter Uber's strategy. Literally thousands of individual arbitration demands were filed against Uber. As arbitrator's fees and expenses in each case would be at least $10,000, and based on the number of Uber drivers at issue, it meant that resolving all the individual arbitration proceedings would cost at least $600 million, without including legal fees and any actual awards for drivers who won.

The institution of these strategies by the drivers resulted in somewhat of a stalemate. Lawsuits were brought by lawyers for more than 12,000 drivers who had filed arbitration demands arguing that the company had refused to pay the filing fees to get the arbitration process going. Uber countered that the drivers had not paid their required share, $400 each, to get the arbitrations going. The number of drivers filing individual arbitration demands was more than 60,000.

In this impasse in litigation issues, something had to give. In a regulatory filing on May 9, 2019, Uber indicated that a "large majority" of the 60,000 drivers filing arbitration claims over employment misclassifications, agreed to a settlement. The filings indicated that thousands of other drivers in two lawsuits in California and Massachusetts against the company also agree to dismiss their claims, agreeing to a settlement in exchange for multi-million dollar settlements. The filings indicated that Uber will pay between $146 and $170 million, including attorney's fees, to settle these claims. Uber will apparently retain its business model of considering its drivers independent contractors rather than employees.

In a related development, the U.S. Supreme Court ruled on April 24, 2019, that a court should not allow class actions in arbitration unless the arbitration agreement clearly authorizes that type of proceeding. *Lamps Plus, Inc. v. Varela*, 2019 BL 145112. The ruling, with a 5-4 majority, suggested that arbitration offers "lower cost, greater efficiency and speed" over lawsuits in court, and that class arbitration lacks those benefits. Thus, the Court interpreted the Federal Arbitration Act as requiring more than ambiguity to ensure that the parties actually agree to arbitrate on a class-wide basis.

Editor's Note: Most experts believe that virtually all employers should evaluate the pros and cons of using individual employment arbitration agreements for their employees. There are many advantages to such procedures, and also variations such as jury trial waivers, and the like. However, it is not a "one size fits all" issue.

UAW Loses Union Vote

Recent Developments. In a nationally-watched union election at Volkswagen in Chattanooga, Tennessee, which concluded on June 14, 2019, the UAW lost another secret ballot union election by a vote of 838-776, a margin of 62 votes. The last plant -wide election was held in 2014, which the union lost by 86 votes.

Background. The history of the situation in Chattanooga is very interesting. First, the UAW has been unable to organize foreign-owned auto plants in the South, including previous losses at Nissan plants in Mississippi and Tennessee. Following its loss at Volkswagen at Chattanooga in 2014, the union successfully organized a smaller voting unit at Volkswagen, comprised of just maintenance employees. However, the election results were contested and the union never negotiated a collective bargaining agreement. Ironically, the election win among the maintenance employees proved problematic for the union, as it delayed its plant-wide election this year because the smaller maintenance unit still existed. The union thus abandoned that smaller unit and the election proceeded plant-wide in Chattanooga.

During the current campaign, Volkswagen stated that it was neutral, and it should be noted that Chattanooga is the only Volkswagen production facility in the world not represented by a union. Nevertheless, there was widespread public advertising and campaigning among the community with television and radio ads being purchased by the UAW, the Center for VW Facts, a pro-union advocacy group, and an anti-union group known as Southern Momentum.

Although Volkswagen itself was publicly neutral, Tennessee Gov. Bill Lee (R) told workers during a visit to Volkswagen that they were fortunate to be in a state "that has the work environment that we have." At the time of the last plant-wide vote back in 2014, allegedly Sen. Bob Corker (R) said the company assured him that the facility would be awarded more work if workers voted not to unionize. In other words, there was publicity by politicians in Tennessee seeing a lack of unions as a selling point for attracting business. Tennessee is a state that is only approximately 6% unionized.

These reports indicate that the message got out in Chattanooga that workers are better off without a union charging dues and perhaps making the plant less competitive. The union was reportedly also hurt by federal corruption charges against prominent union officials. Of course, the UAW blamed its defeat on national labor laws making it "impossible" for unions to organize [even though the NLRB election rules were drawn by union lawyers to promote union organization].