July 2020 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 & Composite Wood Products MACT

Recent Developments. On June 8, 2020, EPA signed a Final Rule to update the PCWP Risk and Technology Review (RTR). Consistent with the previously issued proposed rule, the Final Rule concludes that control technologies for Hazardous Air Pollutants (HAP) emissions for the PCWP industry have not changed since the 2004 MACT was issued and that public health risks are acceptable with "an ample margin of safety." Based on this, the agency did not identify any new control technologies that should be considered when EPA revisits the PCWP MACT (EPA is currently working on the MACT rulemaking).

SLMA and its industry coalition have engaged with EPA regarding the upcoming MACT rulemaking and will continue to pursue dialogue with the agency in order to ensure that the MACT includes work practice standards that are flexible and reasonable for major source lumber producers.

Revisions to "Benefits and Cost Analysis" for Clean Air Act Regulations

Recent Developments. On June 4, 2020, EPA issued a Notice of Proposed Rulemaking for "increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process."

EPA is requesting comment on the potential to implement a more unified approach to considering costs and benefits under various provisions of the Clean Air Act. Although longstanding Presidential Orders requiring cost-benefit balancing date back to 1981, one of the greatest impediments to implementation of the cost-benefit executive orders has been that regulatory agencies such as EPA often have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and thus to comply with the longstanding Presidential Directives to do more good than harm.

SLMA will work with its industry partners to prepare and submit comments on the Proposed Rule. The comments will seek to not only address the types and quality of economic data that should be considered, but also whether and under what circumstances EPA could and should determine that a future significant Clean Air Act regulation should be promulgated only when the benefits of the intended action justify the costs.

We understand that EPA Administrator Wheeler has also recently stated that the Agency plans to follow with similar cost-benefit rules for the water, land, and chemicals programs over the next three years.

Biogenic Carbon Emissions

Recent Developments. None. Recent discussions between EPA and our industry coalition partners indicate that EPA now believes it may need to revise and rewrite the draft rule that is intended to classify biomass as carbon neutral when burned for energy. EPA appears to be concerned about the potential impact of the currently worded rule on other recent EPA actions. EPA reportedly remains committed to the carbon neutrality concept and has indicated it will seek to promptly revise the internal draft.

Background. On December 17, 2020, the House passed the FY20 Appropriations Bill. As with the FY19 Bill, the FY20 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 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.

Proposed SSM SIP Call Rule

Recent Developments. None. Although the litigation continues to be stayed indefinitely (see below), EPA has recently taken actions in Texas and North Carolina that could indicate a willingness to abandon the previously issued 2015 SSM Rule.

Background. On April 24, 2017, the D.C. Circuit granted EPA's request to indefinitely delay oral arguments regarding the pending challenges to the SSM Rule. This move may indicate that EPA is planning to reconsider the Rule internally.

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.

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 part of the previously scheduled 5-year review, which is set to conclude in October 2020.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. A number of legal challenges have been filed by States and environmental groups in response to EPA's April 21, 2020 publication of its final rule defining "Waters of the US" (WOTUS) over which EPA will have regulatory jurisdiction under the Clean Water Act. The Final Rule will take effect 60 days from publication. The Final Rule seeks to clarify and simplify the definition of WOTUS and was issued in response to the Obama era WOTUS Rule that was finalized in 2015 and broadly expanded the reach of the federal government under the Act. The 2015 Rule was repealed in late 2019, and the current action seeks to "replace" the prior rule.

The revised definition includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before. The final regulation excludes from EPA jurisdiction a number of water features, including the following of particular importance to private forest management:

- Ephemeral streams defined as flowing only in direct response to precipitation,
- Manmade ditches that do not flow into a regulated water, and
- Wetlands that do not touch, i.e., are not "adjacent to," a regulated water of the U.S.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

Recent Developments. None. On January 10, 2020, the Trump Administration announced additional proposed revisions to the Act (see prior August 2019 revisions discussed below). The proposed revisions, which are open for public comment for 60 days, take aim at several regulatory reform items, but the most significant changes would address the role of climate change within the ESA review process. The proposed rules would substantially limit the consideration of the impact of a project on climate change by making the following changes to existing rules:

- The Proposed Rule would simplify the definition of "effects" which must be evaluated by striking specific references to direct, indirect, and cumulative effects. Under the new definition, effects must be reasonably foreseeable and have a reasonable causal relationship to the proposed action or alternatives. This means that an effect must have a proximate causal relationship to the agency action to require evaluation.
- The Proposed Rule clarifies that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy chain.
- The Proposed Rule changes current policy by stating that analysis of cumulative impacts is not required under the National Environmental Policy Act (NEPA). As such, only the reasonably foreseeable effects of the actual project in question should be considered in the NEPA analysis.

Together, these proposed revisions are expected to make it significantly easier for large energy projects, such as oil pipelines, to receive agency approval under NEPA.

In addition, on August 12, 2019, the Department of the Interior finalized a series of rules, to significantly revise the process and factors to be used when considering ESA listing decisions. 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 "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. At least 17 states and multiple environmental groups have filed legal challenges to the recently issued final rule.

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

Recent Developments. None. In early May, the industry coalition that has been an intervenor in the case decided not to pursue an appeal of the decision discussed below. At this point, it appears that the federal agencies (EPA and USFWS) intend to pursue their appeals.

On January 28, 2020, the D.C. Circuit issued its long-awaited Opinion on the challenges to the January 2016 listing of the NLEB as a "threatened" (as opposed to "endangered") species. Because the NLEB was listed only as threatened, the Agencies had issued a specially tailored rule under Section 4(d) of the Endangered Species Act that provided more flexibility to impacted landowners and industry. Multiple environmental groups challenged both the listing and the 4(d) Rule. The D.C. Circuit held that the Agencies failed to properly consider all available

information and remanded the Rule back to the Agencies for further consideration. The Court also found that the Agencies did not follow the proper administrative procedures for the prior rulemaking process.

Importantly, the Court did not vacate the Rule but instead sent the Rule back to the Agencies for further review. This means that the current 4(d) Rule will remain in effect until such time that the Agencies issue a new rule on the NLEB. Ironically, the Agencies were already under a routine statutory deadline to "revisit" the Rule, and the timing of the Court-ordered remand will not significantly impact the schedule already in place.

Although it is too early to predict with certainty, because of the ongoing spread of the white-nosed disease that is decimating the NLEB population, many experts anticipate the Agencies will have little choice but to list the NLEB as endangered in the next rulemaking.

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 association 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.

OSHA Informal Guidance Regarding Face Coverings in the Workplace

Recent Developments. On June 10, 2020, OSHA issued informal guidance in the form of frequently asked questions and answers regarding the use of face coverings, such as cloth face masks, in the workplace. OSHA was careful to clarify that cloth face coverings are not considered personal protective equipment (PPE) and therefore, employers are not required to provide them to workers. However, OSHA went on to recommend that employers encourage their workers to wear face coverings at work as a method of source control (to prevent individuals who have COVID-19 from unknowingly spreading it to others) and instructed that face coverings are not intended to replace or substitute for social distancing measures. If an employer determines that cloth face masks actually present or exacerbate a workplace hazard (i.e. the cloth face mask becomes saturated with chemicals used on the production floor), employers should consider whether PPE like face shields or plastic partitions are appropriate. Additional COVID-19 guidance regarding the distinctions between cloth face coverings, surgical masks, and respirators is available at: https://www.osha.gov/SLTC/covid-19/covid-19-faq.html.

Workplace Injuries & 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).

On May 19, 2020, OSHA issued updated enforcement guidance for recording COVID-19 cases. Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work-related as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

If an employer makes a reasonable and good faith inquiry and cannot determine whether the COVID-19 exposure more likely than not happened in the workplace, the employer is not required to record the COVID-19 case. Additional information regarding the COVID-19 reporting requirement, including work-relatedness factors for consideration, is available at: https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

Workplace Injuries & Illness 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

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 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 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.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Supreme Court LGBT Ruling

Recent Developments. In a 6-3 ruling on June 16, 2020, the U.S. Supreme Court ruled that the federal civil rights laws protect workers on the basis of their sexual orientation or gender identity. Bostock v. Clayton County. The much-publicized issue and ruling comes as a surprise to many and serves as a prime example that changes in social mores among the population can affect statutory interpretation.

Background. The opinion was written by Trump-appointed Justice Gorsuch, and joined in by Chief Justice John Roberts, who joined the four more liberal members of the Court. The issue was whether the term "sex" in Title VII of the Civil Rights Act meant more than the biological issue of being a man or woman. The majority of the Court recognized that when the Civil Rights Act was passed in 1964, no one equated gender identity and sexual orientation to biological sex. Indeed, it may come as a surprise to many that the addition of the term "sex" to the Civil Rights law was opposed by most women's groups and virtually all civil rights groups at the time, as it was added by a Southern congressman from Virginia in an effort to promote opposition to the Civil Rights Bill as being too radical. Nevertheless, the "radical" measure adding sex to the Civil Rights laws eventually passed and became the law of the land.

It was not until 2015 that the Equal Employment Opportunity Commission (EEOC) first interpreted Title VII to prohibit discrimination based on gender identity or transgender status. No federal appeals court had ever so ruled prior to 2017. In over four decades, there were numerous occasions in which Congress considered, but rejected, amendments to the 1964 law to add sexual orientation to the list of protected classes.

Perhaps the most common way to interpret a statute is to rely on the express meaning of the text, the intent of the legislators passing the statute, and any subsequent legislative history to amend the law. The irony is that Justice Gorsuch found the Court was required to rely on the express reading of the text, generally a conservative doctrine, in what many consider to be a liberal ruling. Gorsuch framed the issue: "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender." He then held: "The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions he would not have questioned in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids."

Justice Alito wrote a dissent, joined by Justice Thomas, stating: "There is only one word for what the Court has done today: Legislation." He insisted that textualism doesn't mean reading a statute so literally that the purpose of the authors is ignored. Justice Kavanaugh also dissented, but was quite restrained and stated that the Court should give force to the "ordinary" meaning of the laws Congress passes, not a "literal" one.

The ruling is expected to have a major impact in many ways. There are estimates of more than 11 million LGBT persons in the U.S., including over 8 million LGBT in the workforce. Only 21 states previously protected them from workplace discrimination. With the Bostock decision, it is now unlawful for employers employing 15 or more people to discriminate against somebody because they identify as a lesbian, gay, bi-sexual or transgender person anywhere within the United States.

In addition, there are literally hundreds of federal and state statutes that use the term "sex" in their prohibitions. Dissenting Justice Alito discussed the myriad of cases that could lead to unintended consequences. He discussed cases where female athletes may be adversely affected by competing with biological males. He mentioned the use of bathrooms by transgender persons that may affect the privacy interests with persons of a different biological sex using the same bathroom, locker, and possibly even shower facilities. The Court did recognize, but did not answer, whether a company whose owner objects to this decision on religious grounds might not have to comply with this ruling. This decision will also raise critical issues pertaining to the military and the prison systems and dress codes. There will be issues for colleges and universities if a student does not want to have a person of the opposite biological sex as a roommate. Single sex educational institutions will also have to consider whether they must accept a transgender student who identifies with the sex the school serves. Health insurance companies may also have to litigate whether they will or must provide coverage for sex reassignment surgeries. Employers and teachers who have been otherwise reluctant to do so may have to consider whether they are legally required to alter the pronouns by which they address transgender employees and students.

Also, beneath the surface will be the totally yet-to-be litigated issue of what "sexual identity" means. We have already seen this issue concerning racial identities, and some would argue that the law is almost to the point that persons can be any race or sex they claim to be.

The above "list of horribles" is not meant to criticize the ruling, a ruling probably accepted by many Americans under today's social mores. The decision actually may not affect employers as much as others, as for many years now, the vast majority of employers have already recognized these developments and adapted to the environment out of respect for its employees or those it serves or in some cases, to avoid potential litigation.

Defenses Re: Employee Claiming Infection of COVID-19 On the Job

Recent Developments. Employers, along with other establishments all across the country, fear operating under circumstances where employees may claim they became sick with COVID-19 by contracting the Coronavirus at work. In most states, outside of certain healthcare workers, the federal and state executive orders do not grant any immunity to employers from such claims.

Background. Nevertheless, a study of certain state laws, like Georgia, reveal numerous defenses to an employer should such a claim arise. The main defense to court liability would be the exclusive remedy provisions of the workers' compensation laws of virtually all of the states. Under such systems, an employee contending that he or she got injured or sick at work, can only seek compensation by bringing a workers' compensation claim, known as the "exclusive remedy" concept. Some states have exceptions for willful safety violations, or in some cases for claims against managers and supervisors as opposed to the employer itself.

Not immediately apparent is that in many states, like Georgia, the exclusive remedy concept prohibits access to the court system for claims, even where the injury or sickness does not result in a compensable recovery under workers' compensation. In general, for example, in Georgia, diseases are not compensable unless they result from an accident. Even in those situations where occupational diseases are part of the workers' compensation system, there may be defenses unless the disease "is not an ordinary disease of life to which the general public is exposed," or "is not of a character to which the employee may have had substantial exposure outside of the employment."

The bottom line is that in a state like Georgia, an employee claiming the acquisition of COVID-19 at work, may be barred from a court claim, and yet also barred from recovery under the workers' compensation system.

Discharge of Employee Bringing Baseless Harassment Claims

Recent Developments. According to the Sixth Circuit Court of Appeals, the U.S. Army's decision to fire a civilian employee because it found her repeated complaints of harassment baseless, does not violate the federal discrimination laws. *Carrethers v. McCarthy*, 2020 BL 198271 (5/28/20).

Background. The employer had assigned an investigator, who concluded that it was "extremely clear" that the plaintiff was fabricating her complaints. All of the 14 witnesses the plaintiff identified to the investigator contradicted her claims. Thus, the employer had reason to believe the harassment complaints were not made in good faith. Also, even if they were, the employer still had a legitimate basis for firing the employee. The judge cited published rulings by the Fourth, Fifth, Eighth and Eleventh Circuits in support of the conclusion.

Editor's Note: It is extremely controversial, even if legitimate, to fire an employee for making baseless harassment complaints. Such actions should only be taken with advice of counsel.

New Rule for Calculating Overtime for Fluctuating Workweeks

Recent Developments. We all know (or learn) that not everything in life can be carefully planned. For example, some weeks an employer may need a worker for just 30 hours, but in another week may need them to put in 50 hours. The Fair Labor Standards Act (FLSA) has long provided employers with the option to pay nonexempt employees whose hours vary on a salary basis, but at times has offered inconsistent guidance on the impact of bonuses and commissions, or how to calculate overtime. When courts got involved, sometimes there were conflicting rulings.

Background. Under Secretary Scalia's leadership, the U.S. Department of Labor (DOL) is offering some clarification. On May 20, 2020, DOL announced a Final Rule (https://www.dol.gov/sites/dolgov/files/WHD/fww/FR-FWW.pdf) that clarifies that employers may pay bonuses or other incentive-based pay to salaried, nonexempt employees whose hours vary week-to-week. The Final Rule applies to employees who meet the following criteria:

1) the employee's hours fluctuate from week to week;
2) the employee receives a guaranteed salary that does not vary with the number of hours worked (docking employees in "short weeks" is fatal);
3) the amount of the employee's fixed salary is at least equal to minimum wage for every hour worked;
4) the employee and the employer have a clear and mutual understanding about the manner of pay; and
5) the employee receives overtime pay, in addition to salary and any bonuses, for all overtime hours worked.

Note that in this scenario the employer pays an overtime premium of one-half - not one-and-a-half - times the regular hourly rate for each overtime hour. Assuming a worker is paid $400/week for all hours, and works 50 hours and also gets a $50 bonus, pay should be the base salary ($400) plus $50 bonus ($450), divided by the total number of hours worked (50), for a 'regular rate" of $9/hour; plus $4.50 (one-half of $9) per overtime hour, yielding a total paycheck of $495 (base $400 + bonus $50 + 10 hours OT premium = $45).

In addition to changing the title of the regulation from "Fixed salary for fluctuating hours" to "Fluctuating Workweek Method of Computing Overtime," the Final Rule achieves the following:

- Expressly states that employers can pay bonuses, premiums, or other additional pay, such as commissions and hazard pay, to nonexempt employees compensated on a salary basis using the fluctuating workweek method. (See 29 CFR 778.114(a).) These supplemental payments must be included in calculating the employee's "regular rate" (for purposes of overtime) unless they are excluded under other provisions of the FLSA. This allows employers greater flexibility to provide bonuses or other additional compensation to nonexempt employees whose hours vary from week to week and eliminates any disincentive for employers to make supplemental payments.

- Illustrates how an employer may pay an employee a shift differential or productivity bonus in compliance with the rules. (See examples in 29 CFR 778.114(b).) This may be particularly valuable guidance for employers who want to reward their workers with more pay for their efforts in dealing with the COVID-19 crisis.
- Clarifies confusing language to make the fluctuating workweek method easier to understand and administer. (See revised 29 CFR 778.114(a).)

There are several other things to understand about the Final Rule. First, it is not strictly speaking a regulation, but rather a statement of general policy and official interpretation. This affects the degree of deference a court will give it. Regulations have more authority than interpretations; this is an interpretation, and some courts may be less willing to find it binding. Second, there are some surprising omissions. For example, if a nonexempt employee's hours do not vary weekly, but are regularly scheduled; and the employer wants to pay a guaranteed salary for all hours worked, it is not clear that the rule would apply.

The new Final Rule also addresses divergent views that have been expressed by DOL and courts in the past, with a view to eliminating legal uncertainty for employers regarding the compatibility of various types of supplemental pay with the fluctuating workweek method, which can generate significant savings in overtime. In sum, the new rule provides employers concrete guidance to ensure compliance - and avoid punishing employers who give workers extra pay, as the old rules sometimes were interpreted to do.