June 2019 Regulatory Update

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This report only contains information on issues that have changed since the last edition. To view all Clean Air, Clean Water, Occupational Hazard and Safety, and Employment Law issues being tracked by SLMA, log into your member profile on www.slma.org.

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood and Composite Wood Products MACT

Recent Developments. We understand that EPA now intends to issue the proposed rule in late summer and will likely seek an extension of the Court-imposed deadline. SLMA, AF&PA and other industry partners continue to work together to address issues that have been raised by the EPA with respect to the potential rulemaking. On May 15, 2019, the industry partners met with EPA to discuss the potential rulemaking. Among other topics, the industry coalition is engaging with EPA to discuss work practice standards that are flexible and reasonable for major source lumber producers.

"Once In, Always In" Policy

Recent Developments. 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 Regulations

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 FY18 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, 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.

Background. 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."

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 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 state 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. 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.

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 (through the law will continue to prohibit the consideration of economic impacts in a listing decision);
- Restoring the pre-2016 rule that limits consideration of unoccupied areas as critical habitat to situations where there is inadequate occupied habitat; and
- Rescinding Interior's "Blanket Rule" that automatically gave threatened species the same protections as endangered species (Commerce has always considered whether to extend such protections at the time of listing.)

Designation of Critical Habitat for the Black Pine Snake

Recent Developments. None. On November 13, 2018, SLMA joined comments submitted by the Forest Landowners Association on the USFWS' re-opening of the public comment period on a proposal to designate critical habitat in 9 counties in Mississippi and 1 county in Alabama for the Black Pine Snake. The species was listed as threatened in November 2015.

ESA Review of Tri-Colored Bat

Recent Developments. None. The U.S. Fish and Wildlife Service (USFWS) has initiated a 12-month review to determine whether to list the Tri-Colored Bat under the Endangered Species Act (ESA). The underlying rationale for the review is the decline of the species population due to White Nose Syndrome (WNS). If the USFWS determines the bat is endangered, then habitat conservation measures similar to those proposed for the Northern Long-Eared bat would be likely. We will monitor the development of this potential rulemaking as it moves forward.

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

Recent Developments. None. On August 24, 2018, the Court announced that it was cancelling the previously scheduled oral arguments on the pending Motions for Summary Judgment for this case. The Court indicated that it believes it can rule on the Motions without the need for oral argument. Earlier, the Court bifurcated briefing in the case, with this first phase focused on the listing decision, and the second phase will be focused on the 4(d) provisions within the rule.

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

Listing of Louisiana Pine Snake as Threatened

Recent Developments. None. On April 5, 2018, the USFWS designated the Louisiana Pine Snake as "threatened" under the Endangered Species Act. The snake is found in isolated areas of Louisiana and Texas. Because the species was designated as threatened, as opposed to endangered, the USFWS also proposed a special "Section 4(d)" rule that would permit and encourage beneficial forest management across the pine snake's habitat, provided specific conditions to protect the snake and its main food source — Baird's pocket gopher — are met.

Proposed Listing of Eastern Diamondback

Recent Developments. None. USFWS's decision on the petition is past due and may be issued at any time.

OCCUPATIONAL HEALTH & SAFETY ACT

Prepared by Kilpatrick Townsend.

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/

Amputation

Recent Developments. None.

Background. On August 13, 2015, OSHA updated its National Emphasis Program ("NEP") on amputations to include the following targeted industries: "Sawmills," "Wood Preservation," "Wood Window and Door Manufacturing," "Cut Stock, Resawing Lumber, and Planing," "Other Millwork (including Flooring)," and "Wood Container and Pallet Manufacturing." If an employer in one of the targeted industries reports an amputation, it will be subject to an inspection under the Amputations NEP. The contents of the Amputations NEP are available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=6228.

Electric Arc

Recent Developments. None.

Background. OSHA's general industry standards regarding electric power generation, transmission and distribution are captured in 29 C.F.R. § 1910.269. Paragraph (l)(8) of § 1910.269 sets forth employers' responsibilities with regard to protecting employees from flames and electric arcs. Generally, Paragraph (l)(8) requires employers to: (1) assess the workplace for flame and electric-arc hazards; (2) estimate the incident heat energy from electric arcs to which employees would be exposed; (3) ensure that employees wear clothing that will not melt, or ignite and continue to burn, when exposed to flames or the estimated heat energy; and (4) ensure that the employee's outer layer of clothing is flame-resistant; and (5) ensure that employees wear properly rated protective clothing and other protective equipment. Where employees are exposed to arc flashes, employers are required to "make reasonable estimates of the incident heat energy to which the employee would be exposed." 29 C.F.R. § 1910.269(1)(8)(ii). In addition to making the incident heat energy estimate, the employer must ensure that employees wear protective clothing and other protective equipment with an arc rating greater than or equal to the heat energy estimated.

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 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.

Request for Information on Powered Industrial Trucks

Recent Developments. OSHA has requested public comments as it considers initiating rulemaking to revise the General Industry Powered Industrial Trucks standard. The current General Industry Powered Industrial Trucks standard became effective in 1971 and has not been updated since. In contrast, national consensus standards have been updated several times. Powered industrial trucks include forklifts, fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized trucks powered by an electrical motor or an internal combustion engine. OSHA seeks information on:

- The types, age, and usage of powered industrial trucks;
- Maintenance and retrofitting;
- How to regulate older powered industrial trucks;
- Training;
- Types of accidents and injuries associated with operating these machines
- The costs and benefits of retrofitting machines with safety features;
- Related ANSI and NFPA consensus standards; and
- Compliance issues.

Comments will be accepted until June 10, 2019. Comments must reference the Docket No. OSHA– 2018-0008 and may be submitted electronically at http://www.regulations.gov; by facsimile to the OSHA Docket Office at (202) 693-1648; or by mail to OSHA Docket Office, Docket No. OSHA 2018-0008 or RIN (1218-AC99), Room N-3653, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Washington DC 20210.

OSHA Standards Improvement Project

Recent Developments. On May 13, 2019, OSHA issued a final rule updating fourteen provisions in various construction, general industry and shipyard safety and health standards with the goal of removing or revising duplicative, inconsistent, outdated or unnecessary regulatory requirements. The final rule is available at: https://www.osha.gov/news/newsreleases/trade/05132019.

Relevant updates include:

- **Medical Services and First Aid:** When employees are working in remote areas where wireless telephone carriers are unable to provide accurate location information about 911 callers, employers are now required to post in a conspicuous location the latitude and longitude of the worksite or other location-identification information that effectively communicates the location of the worksite.

- **Personal Protective and Life Saving Equipment, Safety Belts, Lifelines and Lanyards:** OSHA has revised the minimum breaking strength requirement for lifelines in the safety belts, lifelines and lanyards standard to 5,000 pounds to conform to the breaking-strength requirements in the fall protection standard.

- **Traffic Signs, Signals and Barricades:** OSHA now requires employers to comply with the 2009 edition of the Manual on Uniform Traffic Control Devices (MUTCD). Previously, OSHA required employers to comply with the 1988 or 2000 editions of MUTCD. The new OSHA rule now aligns with DOT regulations on traffic control signs and devices.

- **Collection of Employee Social Security Numbers:** To the extent that OSHA standards have required employers to collect employee social security numbers for purposes of exposure monitoring, medical surveillance and other required occupational safety and health records, such requirements have been eliminated in order to facilitate employers' efforts to safeguard employee privacy. (Note that this final rule does not affect the use of employee Social Security Numbers for employment authorization purposes).

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

The Return of Social Security No-Match Letters

Recent Developments. Social Security "no-match" letters generate a great deal of concern in the employer community as to how to handle such issues. Immigration and Customs Enforcement (ICE) has in the past taken the position that receipt of one of these notifications creates an affirmative duty to investigate and potentially take action, at least to avoid a potential finding of constructive knowledge of illegal employment. On the other hand, the Immigration and Employee Rights Section (IER) of the Department of Justice has strict rules as to whether employers are going too far in their employment verification duties. At one time, federal regulations provided a safe harbor procedure for handling these issues, but the Obama Administration rescinded the regulation and suspended the issuance of Social Security mis-match letters in 2012. Thus, this year will be the first time in seven years that employers will receive Social Security no-match letters when the government has discovered that the W-2 records submitted by the employer do not match the government's records on employee names and Social Security numbers (SSNs).

Background. In the past, ICE has taken the position that an employer must take affirmative action upon discovering a Social Security discrepancy, but the discrepancy is only "evidence" of constructive knowledge of unauthorized employment. In 2011, the predecessor to IER provided specific "dos and don'ts" related to no -match letters. The most important suggestions in the IER guidance are as follows:

DO:	DON'T:
1. Check the reported no-match information against your personnel records.	1. Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
2. Inform the employee of the no-match notice and ask the employee to confirm the name/SSN reflected in your personnel records.	2. Attempt to immediately reverify the employee's employment eligibility by requesting the completion of a new 1-9 form based solely on the no-match notice.
3. Advise the employee to contact the SSA to correct and/or update SSA records.	3. Follow different procedures for different classes of employees based on national origin or citizenship status.
4. Give the employee a reasonable period of time (no specific time period is listed) to address a reported no-match with the local SSA office.	4. Require the employee to produce specific I-9 documents to address he no-match.
5. Periodically meet with or otherwise contact the employee to learn and document the status of the employee's effort to address and resolve the no-match.	5. Require the employee to provide written evidence from SSA that the no-match has been resolved.
6. Submit any employer or employee corrections to the SSA.	

SSA began issuing letters called Employer Correction Requests in March 2019. These letters do not include the names or SSNs of employees. Instead, the letters ask employer to register online with SSA's business services unit to obtain the no-match information.

Editor's Note: The author recently had a review by IER of a client's immigration practices. IER pressed our client to avoid any type of adverse action against their employees solely because of a no-match letter. This position leaves employers in the dark as to what they should do. In general, employers must investigate, at least to show some responsive action. They would not necessarily have to terminate each employee that is the subject of a no-match. Note that ICE audits normally request employer records concerning no-match letters. The big issue is when or if an employer is required to terminate an employee who has failed to show a correction of the mismatch issue by the SSA. There appear to be more Social Security mismatches than there are unauthorized immigrants, and multiple reports of a mismatch often involve the same Social Security number. The mismatch notices themselves have often disclaimed reliance on them as the sole basis to terminate an employee. Further, SSA itself often takes 120 days and sometimes more to correct a mismatch.

In this situation, employers need legal counsel as to what approach to take when no confirmation from SSA of a correction is received. A reasonable option is to give employees plenty of time to confirm the correction, such as 60 to 120 days, and another controversial option is to allow employees to provide other identity and work authorization documents sufficient to complete a new I-9 form in appropriate situations.

LGBT Rights

Recent Developments. The courts have been in conflict in recent years as to whether gay and transgender people are protected from discrimination on the job, an issue the Supreme Court agreed to review on April 22, 2019. Title VII of the 1964 Civil Rights Act prohibits job discrimination because of "sex."

Background. The traditional interpretation of Title VII does not expand the word "sex" to include sexual identity or transgender status. However, in 1989 the U.S. Supreme Court held that discrimination on the basis of sex encompasses "sex stereotyping," and this interpretation has been utilized in some cases where LGBT have alleged that they were discriminated against because they did not conform to the stereotypes of their gender. Others are urging the courts to adopt a more modern understanding of "sex" that encompasses job bias against a worker who is gay, lesbian, bisexual, or transgender. A number of states and localities have enacted their own laws that protect LGBT workers from discrimination. The federal government itself has taken different views on the issue, as the EEOC argues that the federal civil rights law protects workers against sexual orientation discrimination while the Justice Department takes the opposite position.

More Workers Went on Strike in 2018

Recent Developments. The Bureau of Labor Statistics announced on February 8, 2019, that there were 20 major work stoppages in 2018 that involved almost one-half million U.S. workers. The total number of workers who participated was the highest since 1986. There were actually 167 total work stoppages, with major work stoppages defined as those involving 1,000 or more workers.

Background. The first and second largest work stoppages were by school teachers in Arizona and Oklahoma. Educational services, health care, and social assistance industry groups accounted for approximately 90% of those participating in work stoppages. This year, there was a major strike among Stop and Shop workers that shut down 246 grocery stores in three states, reportedly over employer-sought concessions on healthcare coverage, pensions, and premium pay on Sundays and holidays. The 31,000 unionized retail workers struck on April 11, 2019 and picketed outside the Stop and Shop stores in Connecticut, Rhode Island and Massachusetts for 11 days, until a tentative agreement was reached on April 22, 2019. Reportedly, the 11-day strike cost the company approximately $100 million. Stop and Shop says it is New England's only remaining fully unionized large supermarket company, and said it sought concessions to remain competitive with other non-union stores. The company reportedly is proceeding to control its costs through self-checkout registers and even robots.

A recent development is the growth of work stoppages even among non-union employers. In 2014, thousands of workers at Market Basket, a New England grocery chain, mounted a strike to demand the company reinstate the recently fired CEO. Coworker.org is a network of employees with tools suggesting how employees can push for changes in their working lives. Petitions are being more widely circulated among employees seeking changes, such as the 20,000 signatures for dress code changes at Publix. Further, the internet allows workers to go public with experiences that trigger public reaction. Some experts feel that employees are seeking more of a voice on their job conditions but not necessarily a traditional union.

Technology Companies Beset by Employees Protests

Recent Developments. Employee protests at technology companies have gone beyond common employee issues and expanded to important company business decisions.

Background. As workforces become more skilled and unemployment drops, certain industries have become more tolerant of outspoken employees. Over the last year, workers have protested at companies over military contracting, sexual harassment, and the treatment of temporary and contract workers. At Microsoft, employees are demanding that the company abandon a $480 million contract with the U.S. Army. Hundreds of Microsoft workers have signed a petition criticizing a contract with U.S. Immigration Customs Enforcement. At Facebook, employees are protesting use of staffing firms to supply some 15,000 content reviewers. At Google, workers staged sit-ins over a dozen offices protesting retaliation against workers involved in activism. Some 15 shareholder proposals at Amazon come from its own employees covering topics from food waste and facial recognition to the environmental effects of company locations.

These developments put company CEOs in a dilemma. Executives have duties to shareholders, which must be balanced against employee desires. Further, companies and CEOs themselves may generate some of this employee activism by "CEO activism" on certain public issues. Thus, CEOs and their companies can face backlash from employees and even from consumers who disagree with their point of view on current social and political issues. In this environment, CEOs should not be surprised when customers or employees disagree with their positions on issues. Careful planning is necessary so that CEOs won't be blind-sided on certain issues. CEOs should consider a public relations or corporate communications team to plan such responses to the next big issue.

Democratic Candidates Sponsor a New Labor Bill

Recent Developments. At least seven Democratic candidates for President have cosponsored The Protecting the Right to Organize Act, a bill introduced on May 2, 2019 in the Senate by Patty Murray (Wash.) and in the House by Bobby Scott (VA.).

Background. Among other things, the bill would do the following:

1. The NLRB could fine employers as well as allow equitable relief like back pay.
2. Workers would be allowed to take their employers to court for unfair labor practice violations rather than just to the NLRB.
3. Employers would be prohibited from hosting “captive audience” meetings with workers when they seek to join unions.
4. Employers would be limited in their rights to require mandatory individual arbitration of employee claims, and prohibiting employers from forcing their employees to waive their right to bring class action claims.
5. The bill would support public sector unions by allowing employers and unions to enter into contracts where unions can collect “fair-share” fees from non-union workers.
6. The bill also would expand the definition of employee to discourage the misclassification of workers as independent contractors.

Among those co-sponsoring this bill are Senators Kamala Harris (Cal.), Bernie Sanders (VT.), Elizabeth Warren (Mass.), Cory Booker (N.J.), Kirsten Gillibrand (N.Y.), and Amy Klobuchar (Minn.) and Rep. Tim Ryan (Ohio).

The Coalition for a Democratic Workplace, supported by various industry groups, calls the bill "an attempt to increase union membership at any cost." In a related development, Bernie Sanders has entered into a collective bargaining agreement on behalf of his campaign staff with the United Food and Commercial Workers Union.

Independent Contractor/ Misclassification Issue Affects Entitlement to Employment Benefits Too

Recent Developments. Most companies are familiar with the great amount of publicity and litigation involving the classification of workers as employees or independent contractors. But companies may not be aware of a rarely publicized concern, the concern being that under the companies' policies, employees are entitled to various benefits, such as healthcare coverage and possibly retirement and other benefits. Thus, if a worker is determined to be an employee rather than a contractor, a company's potential liability for employment benefits can be large.

Background. A closely-watched case dealing with these issues is now pending before the federal Sixth Circuit Court of Appeals, in *Jammal v. American Family Insurance Company*, No. 17-4125, Petition for Rehearing 2/26/19. A three-judge panel of the Sixth Circuit had determined that about 7,200 insurance agents were independent contractors not entitled to employment benefits, based on an analysis suggested by the factors set forth in the U.S. Supreme Court ruling in *Nationwide Mutual Insurance Co. v. Darden*. A lower court judge had ruled that the company was wrong to classify the agents as independent contractors, but the Sixth Circuit had reversed that decision. The plaintiff insurance agents want all of the Sixth Circuit judges to rehear their case, giving them another opportunity to prevail.

Editor's Note: The determination of whether purported independent contractors might be found to be employees and thus covered by company benefit policies may be determined by contractual principles, often relying on criteria set forth in the relevant benefit plan documents. Companies should be careful how these plan documents are drafted in order to lessen exposure to this type litigation. Further inducement for employers to examine their contractor relationships, are announcements during March that Swift Transportation has agreed to pay $100 million to end a long-standing suit alleging that it makes its workers faux "owner-operators" to avoid federal and state wage laws, and that Uber Technologies has agreed to pay $20 million to drivers to settle a lawsuit claiming the ride-hailing company misclassified those drivers as independent contractors.