March 2018 Regulatory Update

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SLMA
200 Greencastle Rd
Tyrone, GA 30290

CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Clean Air Act and EPA's "Once In, Always In" Policy

Recent Developments. On January 25, 2018, the U.S. EPA issued a memorandum indicating that it is revising its long-term Clean Air Act policy commonly referred to as the "once in, always in" policy. The "once in, always in" policy was developed in 1995 and required that any source that was subject to "major source" standards for the control of hazardous air pollutants (HAPs), i.e., federal MACT standards applicable to sources with more than 25 tons per year of HAP emissions in total or 10 tons per year of any individual HAP, *would* always remain subject to those major source rules even if it reduced its emissions below the applicability thresholds. This policy prevented sources that controlled their HAP emissions below major source levels from reclassifying themselves as an "area source." Area sources are more likely to be able to avoid the Title V permitting program, including its cumbersome record-keeping and reporting requirements and its expensive and time-consuming applications and permit renewals.

In its recent memorandum, EPA explained that it now believes the former policy went beyond the requirements of the Clean Air Act. By ending the policy, EPA states that it hopes to reduce regulatory burdens on affected industries and states. EPA has also stated that it will soon issue a proposed rule soliciting public comment on what regulatory revisions, if any, are necessary to memorialize this policy change.

Plywood and Composite Wood Products MACT

Recent Developments. Responses to EPA's Information Collection Request ("ICR") were required to be submitted to EPA by affected facilities on February 9, 2018. In addition, EPA previously announced that it will be scheduling several plant tours in the coming months to gather additional information related to the potential rulemaking.

Biogenic Carbon Emissions

Recent Developments. On February 13, 2018, EPA Administrator Pruitt issued a letter and affirmed that the EPA is working to implement the Congressional biomass carbon neutrality directive that was passed last year. EPA will work with the USDA and the Department of Energy (DOE) to establish "consistent approaches on the use of biomass for energy" in accordance with directives included in the 2017 Appropriations Bill. This has been a long time goal of the entire forest products industry sector.

Administrator Pruitt also indicated that he intends to revisit EPA's procurement policy so that it no longer recognizes only those products from forests certified to the Forest Stewardship Council. Pruitt indicated that the new policy will now mirror the USDA's Bio-preferred Program and will recognize those lands certified to the Sustainable Forestry Initiative or the American Tree Farm System. The USDA Bio-preferred program was amended in the last Farm Bill to allow traditional forest products to participate in its labeling and procurement preference program.

Boiler MACT Rulemaking/ Litigation

Recent Developments. None. In the Boiler MACT reconsideration rule litigation, oral argument was heard on September 15, 2017. 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.

In the primary case appeal, on December 23, 2016, the DC Circuit issued an order granting EPA's petition for rehearing of the remedy portion of the court's July 29, 2016 decision. The court held that EPA improperly excluded the emissions data from some boilers when establishing standards for certain subcategories of major source boilers. The court initially decided to vacate (terminate) these defective standards, but EPA asked the court to change is prescribed remedy from vacatur to remand. All other petitions for rehearing were denied and the court issued the mandate in the major source and area source cases. The issuance of the mandate signifies

the end of the litigation. All of the emission standards in the rule will remain in effect while EPA addresses the defective standards on remand.

NHSM Rulemaking/ Litigation

Recent Developments. On February 7, 2018, EPA published its final rule to categorically list creosote-borate, copper naphthenate and copper naphthenate-borate treated railway ties as a non-waste fuel under the Non-Hazardous Secondary Materials rule. As with the prior proposed rule, the burning of these rail ties is subject to certain limitations set fourth in the final rule.

Revised Ozone Standard

Recent Developments. None. On July 18, 2017, the House passed the Ozone Standards Implementation Act of 2017. If finalized, the Act would, among other things: extend the schedule for implementation of the 2015 Ozone Standards; change the mandatory NAAQS review period from 5 to 10 years; and authorize EPA to consider technological feasibility when revising NAAQS.

The D.C. Circuit announced that it will delay oral argument in its review of challenges to the new ozone standard indefinitely in order to allow EPA and the Trump Administration time to review the rule for possible revocation or revision.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. On January 31, 2018, EPA issued a final rule delaying the implementation date of the 2015 WOTUS rule for a period of two years. This rule was considered to be necessary, in part, because the recent Supreme Court ruling, discussed below, will result in the dissolution of the Sixth Circuit's current nationwide stay of the WOTUS rule. The purpose of the delay rule, therefore, is to ensure that the WOTUS rule is not applied during the ongoing litigation and proposed rulemakings already underway. Environmental groups and states have already filed challenges to the delay in federal court.

EPA will now proceed to complete its proposed revisions to the definition, which the agency will release this spring. If this rulemaking is not completed within the two-year period, the 2015 definition will go into effect.

On January 22, 2018, the U.S. Supreme Court ruled that challenges to the Obama-era WOTUS Rule, defining the federal government's authority under the Clean Water Act, belong at the district court rather than appellate court level.

This decision creates significant uncertainty regarding the fate of the Rule for several reasons. First, it removes the previously issued Stay of the effectiveness of the Rule that had been issued by the Sixth Circuit. The removal of the Stay allows the Rule to take effect in any jurisdiction that has not already been issued a Stay by a district court, e.g., 13 states in upper Midwest and Northwest. Second, litigation will be splintered across the U.S. going forward which will likely create additional disparities regarding the impact of the Rule among states.

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.

On February 28, 2017 President Trump signed an Executive Order directing the EPA and Corps to reconsider the controversial "Waters of the United States" rule. The WOTUS Rule was finalized in 2015 and has been criticized as an attempt by EPA to extend its jurisdictional reach far beyond the traditional concept of "navigable waters."

On November 28, 2017, the Waters Advocacy Coalition submitted comments on the pending reconsideration of the appropriate scope of the definition of WOTUS. SLMA reviewed the WAC comments and supports them.

State Water Quality Criteria

Recent Developments. None. On December 7, 2017, we learned that the Department of Justice will file a document in U.S. District Court in Maine stating that EPA has decided to retain the federal water quality standards it promulgated for the State during the last Administration. From discussion with EPA staff, we have been informed that the Administrator agreed with this action only after having been assured that EPA's position in Maine will not prejudice its ability to take a different position in Washington and Idaho.

Background. On December 19, 2016, 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, an industry association filed a Petition for Reconsideration to EPA for the Washington State rule.

We also understand that EPA intends to issue a similar rule for the state of Idaho within the next 12 months.

OCCUPATIONAL HEALTH & SAFETY ACT

Prepared by Kilpatrick Townsend.

Reminder to Post OSHA 300A Annual Summary

At the end of each calendar year, all employers, except those who are exempt from OSHA's recordkeeping requirements, must create an annual summary of the injuries and illnesses using the OSHA Form 300A Summary or equivalent form. The OSHA 300A Summary must be signed by a *company executive*. The OSHA 300A Summary must be posted no later than **February 1, 2018** and must remain posted until **April 30, 2018**. Employers must create and post the OSHA Form 300A Summary even if there were no recordable injuries. As of January 2, 2018, the penalty for failure to post the required annual summary increased to $12,934.00 per violation.

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 2016 edition of the NFPA General Standard on the Fundamentals of Combustible Dust ("NFPA 652").

Companies considering material modifications or system upgrades between now and September 2020 should confirm that they meet the specifications in NFPA 652 and 664. Under the current draft of the 2019 NFPA standard on combustible dust, all facilities with combustible dust hazards must complete a Dust Hazard Analysis ("DHA") by September 7, 2020. A DHA is a systematic review to identify and evaluate potential fire, flash fire, or explosion hazards associated with the presence of combustible dust in a process or facility and provide recommendations to manage the hazards (similar to OSHA's Process Hazard Analysis for hazardous chemicals). Once a hazard analysis is completed, OSHA generally expects facilities to implement the recommendations as soon as possible, but in any event, no later than one to two years after the hazard analysis is completed. Thus, at the conclusion of the DHA, if systems or equipment are found non-compliant with NFPA specifications, they must be upgraded.

Workplace Injuries and Illnesses Recordkeeping

Recent Developments. None.

Background. Under OSHA's recordkeeping regulations (29 C.F.R. § 1904), covered employers must prepare an OSHA 301 Incident Report or equivalent form for certain work-related injuries and illnesses. Employers must also document each recordable injury or illness on an OSHA 300 Log. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, these employers must review their OSHA 300 Logs to ensure that they are complete and accurate and must correct any deficiencies. At the end of each calendar year, all employers, except those who are exempt from OSHA's recordkeeping requirements, must also create an annual summary of the injuries and illnesses using the OSHA Form 300A or equivalent form. Employers are required to retain these records for five years following the end of the calendar year that these records cover.

Recordkeeping citations are low-hanging fruit for OSHA. The Occupational Safety and Health Act states that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

Workplace Injuries and Illnesses Reporting

Recent Developments. The OSHA Injury Tracking Application currently is accepting 2017 OSHA Form 300A injury and illness data. OSHA recently announced that it will not accept OSHA Form 300 and Form 301 data at this time. OSHA plans to issue a Notice of Proposed Rulemaking to reconsider, revise or remove the collection of OSHA Forms 300/301 data, among other provisions of the electronic reporting final rule, shortly. The deadline to submit 2017 OSHA Form 300A data is **July 1, 2018**. Additional information regarding the electronic reporting requirement is available at: https://www.osha.gov/injuryreporting/.

Background. As of January 1, 2015, all employers must report work-related fatalities to OSHA within eight hours of the incident resulting in the fatality and must report to OSHA all work-related in-patient hospitalizations that require care or treatment, all amputations, and all losses of an eye within twenty-four hours of the incident.

On May 11, 2016, OSHA issued the final rule requiring employers to electronically submit injury and illness data on an annual basis. The final rule requires establishments with 250 or more employees to annually submit the OSHA 300 Log, OSHA Form 300A, and OSHA Form 301 incident reports, while establishments with 20 to 249 employees in certain industries (such as manufacturing) are only required to submit the OSHA Form 300A. All covered establishments were required to submit data from their 2016 OSHA Form 300A to OSHA by December 30, 2017. The final rule required establishments with 250 or more employees to submit the preceding year's OSHA Form 300A and OSHA Form 301 incident reports, along with the OSHA 300 Log, to OSHA starting on July 1, 2018 and on an annual basis thereafter. As discussed above, OSHA recently proposed modifying this requirement.

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.

Walking-Working Surfaces and Fall Protection Standards

Recent Developments. None.

Background. OSHA adopted general industry standards on Walking-Working Surfaces (29 C.F.R. part 1910 subpart D) and Personal Protective Equipment (29 C.F.R. part 1910, subpart I) in 1971. On January 18, 2017, OSHA's final rule updating general industry walking-working surfaces and fall protection standards went into effect. The updated requirements apply to the use and maintenance of fall protection systems, fixed and portable ladders, stepstools, mobile ladder stands, mobile ladder stand platforms, and stairways. Employers may choose from several fall protection options, such as guardrail systems, safety net systems, personal fall arrest systems, positioning systems, travel restraint systems, and ladder safety systems.

The final rule also requires employers to equip all fixed ladders that extend more than 24 feet with some form of fall protection. By **November 19, 2018**, existing fixed ladders that currently do not have any fall protection must have a cage, well, ladder safety system, or personal fall arrest system, and new ladders and replacement ladder sections must have either a ladder safety system or personal fall protection system. By **November 18, 2036**, *all* fixed ladders that extend more than 24 feet must have a ladder safety or personal fall arrest system. The final rule also required employers to train (and retrain as necessary) employees who are exposed to fall hazards on fall prevention and the proper use of fall protection equipment by **May 17, 2017**.

OSHA Request for Information on Electrical Standard for General Industry

OSHA is soliciting public comments regarding the following documentation requirements in the General Industry Electrical Standard (29 CFR part 1910, subpart S):

"The information collection requirements specified by the Electrical Standards…for General Industry alert workers to the presence and types of electrical hazards in the workplace, thereby preventing serious injury and death by electrocution. The information collection requirements in [this Standard] involve the following: the employer using electrical equipment that is marked with the manufacturer's name, trademark, or other descriptive markings that identify the producer of the equipment, and marking the equipment with the voltage, current, wattage, or other ratings necessary; requiring each disconnecting means for motors and appliances to be marked legibly to indicate its purpose, unless located and arranged so the purpose is evident; requiring the entrances to rooms and other guarded locations containing exposed live parts to be marked with conspicuous warning signs forbidding unqualified persons from entering."

OSHA is particularly interested in whether these information collection requirements are necessary for the proper performance of the Agency's functions, the quality, utility, and clarity of the information collected, and ways to minimize the burden on employers who must comply. To submit comments, go to http://www.regulations.gov (Docket No. OSHA-2011-0187). Comments must be submitted by **March 19, 2018**.

OSHA Request for Information on Slings Standard

OSHA is soliciting public comments regarding the following documentation requirements in the Slings Standard (29 CFR 1910.184):

"The Slings Standard (29 CFR 1910.184) specifies several paperwork requirements, depending on the type of sling (paragraph (e) of the Standard covers alloy steel chain slings; paragraph (f) covers wire rope slings; paragraph (g) covers metal mesh slings; paragraph (h) covers natural and synthetic fiber-rope slings; and paragraph (i) covers synthetic web slings).

The purpose of each of these requirements is to prevent workers from using defective or deteriorated slings, thereby reducing their risk of death or serious injury caused by sling failure during material handling. The information on the identification tags, markings, and coding assist the employer in determining whether the sling can be used for lifting. The sling inspections enable early detection of faulty slings. The inspection and repair records provide employers with the date of the last inspection and the type of repairs made. This information provides assurance about the condition of the slings. These records also provide the most efficient means for an OSHA compliance officer to determine that an employer is complying with the Standard. Proof-testing certificates give employers, workers, and OSHA compliance officers assurance that the slings are safe to use."

OSHA is particularly interested in whether these documentation requirements are necessary for the proper performance of the Agency's functions, the quality, utility, and clarity of the information collected, and ways to minimize the burden on employers who must comply. To submit comments, go to http://www.regulations.gov (Docket No. OSHA-2011-0063). Comments must be submitted by **March 19, 2018**.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Will ICE Raids Return and In What Form?

Recent Developments. Immigration and Customs Enforcement (ICE) acting Director Thomas Homan said last October that he would quadruple ICE's worksite enforcement efforts, but did not give any details. Let us review a little history of ICE "raids" as they have been conducted in the past, and what it means for employers this year, particularly beginning with the new fiscal year on October 1.

Background. During the early part of the administration of President George W. Bush, there was not much attention given to ICE enforcement actions as the focus was generally limited to unauthorized individuals that might be posing a national security threat. The strategy changed dramatically in the latter part of the Bush Administration, particularly between 2006 to 2008. While ICE only arrested 527 individuals in FY 2005, that number jumped to 6,287 in FY 2008. Further, ICE performed highly-publicized "raids" in which large numbers of ICE agents would surround a facility (and occasionally surrounding residential areas) and investigate all workers therein. Some work sites lost 80% of their work forces in less than a week, and ICE followed up by attempting to make criminal cases against company officials that had knowledge of the illegal status of the workers. Such actions definitely got the attention of the employer community. However, because of the cost of conducting such massive raids, and the planning and organization necessary to carry them out, such raids did not occur often. ICE attempted to make up for much of its costs for such raids by seeking massive fines against the work sites that were raided. While many attempts were made to criminally prosecute employer officials, the illegal workers themselves were generally released and simply went to work at other establishments.

ICE enforcement strategy changed significantly during the Obama Administration. There were no high-profile "raids" conducted in the manner conducted during the Bush Administration, but instead a new concept was emphasized, popularly known as "silent raids." These type raids did not result in large numbers of ICE agents surrounding a facility and then questioning all therein, but instead involved a significant increase of desk audits. Such I-9 audits went from 1,444 in FY 2009 to 3,127 in FY 2013. Since desk audits were much cheaper to conduct than Bush-era raids, more employers were investigated which created a different type of deterrent to law violations. The "silent" raids, however, resulted in very few criminal prosecutions or deportations of illegal workers. The prime enforcement mechanisms were civil fines for I-9 paperwork violations and requirements on employers to terminate the unauthorized workers.

There is a great deal of speculation on what ICE's enforcement emphasis will be in the future, particularly in light of acting Director Homan's comments. In January of this year, the media reported that ICE "raided"

7-Eleven franchises throughout the country, approximately 100 different facilities. While the media reports suggested that the Bush-era "raids" were being resumed, actually the enforcement was more like a massive number of "silent raids" conducted against a single franchise operation. Only 21 undocumented workers were arrested as a result of these raids.

Now let us speculate what the enforcement strategies are going to be under acting Director Homan, particularly beginning around the first of July when Homan indicated new strategies will probably be implemented. This writer is skeptical that budget restraints allow ICE to conduct the massive "raids" as conducted during the last 2-3 years of the Bush Administration, due to the enormous concentration of resources that would only be directed at a very few employers, and the enormous expense of conducting such operations. For example, in one Bush-era raid of which this writer represented the employer, almost all ICE agents across the U.S. were utilized to conduct a single raid.

This writer submits it is more likely that expanded "silent" raids such as those utilized at 7-Eleven will be implemented, as they are much less expensive but at the same time create a great deal of publicity that ICE desires as a deterrent to immigration violations. There may be a few cases where massive fines are assessed, with the best example being Asplundh Tree Expert, which was recently hit with a record-setting $95 million settlement for allegedly knowingly hiring illegal workers. Another change is that rather than merely requiring the employer to terminate the unauthorized workers, a practice followed during both the Bush and Obama Administrations, the Trump Administration is more likely to have the unauthorized workers deported.

Let us now consider the other half of immigration enforcement, the anti-discrimination provisions protecting immigrants against disparate treatment in hiring and employment. Many employers are caught by surprise when they find that they cannot ask immigrants for specific or different documents, or focus their internal I-9 audits on such immigrants, as the immigration laws protect such persons from disparate treatment. There has been a great deal of turnover at IER (Immigrant and Employee Rights), and the current leadership therein seems to be somewhat in limbo. Some of the cases in process have basically been suspended, and this writer believes that the IER is awaiting new leadership.

Reasons for the Decline in Union Strikes

Recent Developments. Over the last 25 years, the number of U.S. workers who are members of unions has dropped from about 16.7 million to about 14.8 million, even though the total workforce has grown significantly over that period of time. According to Bloomberg Law Labor Data, however, the number of strikes has dropped six times faster, from 793 in 1990 to 102 in 2015. Strikes over the years have historically been considered the only real power the unions have. So why are strikes withering away? Undoubtedly, opinions differ on this subject. Let's consider this writer's opinions.

Background. The beginning point is probably to look at the financial implications of a strike, and the attitudes of both unions and management in negotiating collective bargaining agreements (CBA). In general, strikes are so expensive that few unions can afford them. The expense comes from first, the elimination of union dues during the period of the strike. Second, at a minimum, unions have to engage staff members, lawyers, and others to manage the strike. Also, many unions provide at least minimal financial assistance to the strikers during the course of the strike. All these things add up to an enormous expense. In a recent strike involving less than 2,000 electrical workers in New York, the strike cost the union over $4 million in strike funds alone. A business manager of the local on strike candidly stated that the union was going to try to help the people but he didn't know if they were ever going to go back given the position of the company.

Another risk for unions, besides financial, is decertification. Generally, union members crossing the picket line are harassed by the union, and the new hires have no interest in joining the union, thus creating a "perfect storm" for union decertification. Unions know they have this risk when they strike.

Employers, on the other hand, often have greater ability to withstand strikes today. They have learned how to build up inventory, to shift work to other plants, to use labor services to bring in replacements, and to

otherwise survive a strike. It is much more difficult for unions to boycott company products today than it used to be, another factor.

Of course, strikes cost companies tons of money as well. Further, companies know that when strikes end, sometimes it takes a long period of time to build back the comradery in the workplace that promotes efficiency. Companies, too, want to avoid strikes.

But it is probably the attitudes of the parties that explains much of the decline in strikes, rather than finances. Unions are not organizing that many new employers today, so most collective bargaining relationships are long-standing. The companies have become accustomed to dealing with unions, and many companies candidly admit they are not opposed to the union. Some companies may feel they get "breaks" with government enforcement agencies or public opinion by having a union. Some may feel they can tell workers to "blame the union" over the problems, not the company. Others feel that the union actually helps the company solve problems.

But it is the attitude of union negotiators that has particularly changed. In the "old days," labor negotiations were extremely adversarial, with "pounding the table" and the like. Today, negotiations are much more accommodating. Both union training and business schools are teaching cooperation in labor-management relations. Unions skillfully phrase their arguments on how their proposals can actually benefit the company, making the company much more supportive of the union's position. In the "old days," unions pushed to build a common "labor standard" in entire industries, or entire areas, so that the cost of labor would not be a part of industry competition. Unions have largely abandoned this philosophy, and are willing to look more at local conditions in resolving negotiating issues. Both parties increasingly seem to have common interests in hiring and retaining a qualified workforce, thus lessening the controversy over wage proposals. To some extent, the same common interest applies to benefits. Further, unions at one time insisted on employer participation in "union benefit plans," but that push by unions has also declined. Unions are increasingly realizing and saying that the success of the union depends on the success of the company as well.

Nevertheless, employers as a whole that are union free generally wish to stay that way. There is an administrative cost that goes with having a union, including dealing with union stewards, negotiating labor agreements, and the like. Unions' preference for seniority-based systems and equality in pay rates works against management philosophy in some cases. Some believe that the increasing significance of healthcare costs may create controversies in union-management relations. Whether union or non-union companies are more efficient is a matter of continuing debate.

Should Employers Keep Email Addresses of Employees, Or Not?

Recent Developments. Some employers are asking whether they should collect employee email addresses. The main concern is that under the NLRB "quickie election" rule, after a union files an election petition with the NLRB, the union is entitled to the email addresses of voting employees retained by the employer. Thus, by collecting employee email addresses, the employer may be doing the union's "homework" for it, allowing the union to freely communicate with employees.

Background. On the other hand, employee email addresses are very helpful to employers. Employers can use such email addresses to communicate benefit information to employees, to allow employees to exercise benefit options on-line, to do exit interviews, and to handle a host of other matters.

Let us first review some of the various considerations. In December, the Republican-majority members of the NLRB asked certain questions in consideration of a revision of the "quickie election ruling" itself. Such a change in regulations takes a long time, however, probably a couple of years and possibly longer. The current regulations require the employer to provide such email addresses after the filing of the union election petition if the employer has the email addresses.

While the current Administration can make certain changes administratively in the quickie election rule, it cannot rewrite the rule itself and so the quickie election provision on email addresses is likely to continue until the rule itself is modified or revoked.

Thus, there are many corporate advantages to requiring employee email addresses, with the main disadvantage appearing to be the quickie election rule. Another disadvantage is that the government may use employee email addresses in an effort to enforce other laws, such as discrimination laws. But can the employer itself utilize to its advantage the email addresses to counter union organizational attempts? This writer thinks it can.

First, often the most important part of a union organizing campaign is the pre-election petition campaign of the union and the informational counter-campaign conducted by the employer. If the employer has employee email addresses, it can communicate its informational campaign to employees, and their families, by email. The union will not have access to such email addresses until two (2) business days after an election agreement is finalized by the NLRB, company and union. Thus, having access to employee email addresses can benefit the employer during the lengthy organizational process, which occurs prior to the election petition being filed.

Thus, the question is a close one. Employers should note that if the "quickie election" rules are scaled back, email communications can remain a good vehicle for HR use both ways.

A similar question is raised with respect to the "quickie election" rules as it relates to the submission of cell phone numbers, which would also be conveyed to unions if you have them available in a list. However, the potential value of such numbers to the employer (unless necessary for operational purposes) is much less than emails. Furthermore, the use of cell phones for union campaign matters is more intrusive and, in some cases, legally problematic for employers. As such, the collection of these numbers is not encouraged unless it is already done for HR or operational purposes.