# March 2019 Regulatory Update

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# CLEAN AIR ACT

***Prepared by Kilpatrick Townsend.***

**Plywood and Composite Wood Products MACT**

**Recent Developments.** 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 December 13, 2018, 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.

**Climate Change Regulations**

**Recent Developments.** On December 6, 2018, EPA issued a Proposal to revise the regulations governing greenhouse gas emissions from new coal-fired power plants. The Proposed rule would do away with the current requirement (established during the Obama Administration) which strictly limited potential greenhouse gas emissions from newly constructed power plants. The Proposal is expected to generate strong resistance from the public and environmental groups. Interestingly, there are no current plans to build any new coal-fired power plants in the U.S. at this time.

In this proposal, EPA, in accordance with the April policy issued by Administrator Pruitt on biomass (discussed in the section below), treats biomass derived from "responsibly managed" forests as carbon neutral. While "responsibly managed" is not defined, EPA references ensuring that forest biomass is not sourced from lands converted to non-forest uses, which echoes the bipartisan language enacted by Congress in both the Consolidated Appropriations Act for FY17 and the FY 18 Omnibus Appropriations Act.

**Biogenic Carbon Emissions**

**Recent Developments.** On February 14, 2019, the House passed the FY19 Appropriations Bill. Among other things, the Bill emphasized the key role that forests can play in addressing the energy needs of the United States. The Bill directed the DOE, DOA and US EPA to ensure that Federal policy relating to forest bioenergy is consistent across all Federal departments and agencies and recognizes the full benefits of the use of forest biomass for energy, conservation, and responsible forest management. The Bill also directed the agencies to establish clear and simple policies for the use of forest biomass as an energy solution, including policies that reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source.

**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."

See also above for developments on this issue as it relates to the proposed Affordable Clean Energy Rule.

**Proposed SSM SIP Call Rule**

**Recent Developments.** None. On April 24, 2017, the D.C. Circuit granted EPA's request to *indefinitely* delay oral arguments, which had previously been scheduled to begin on May 8th, regarding the pending challenges to the SSM Rule. This move may indicate that EPA is planning to reconsider the Rule internally.

**Background.** November 22, 2016 marked the deadline for states to complete their SIP revisions in response to the final rule. There was a variety of state responses with many states choosing to accept EPA's proposed language and others delaying their actions until completion of the litigation. Briefing has been completed in the litigation filed by a broad coalition of industry, states, and state agencies asking the D.C. Circuit to strike down the SSM Rule.

**Boiler MACT Rulemaking/ Litigation**

**Recent Developments.** None. On July 3, 2018, the D.C. Circuit denied the Sierra Club's request for the Panel Rehearing (discussed below).

In addition, SLMA continues to work with its industry partners on the portions of the Rule that were remanded to the agency on March 19, 2018. The industry group met with EPA recently to discuss potential fixes to the Rule. On March 19, 2018, the DC Circuit issued its decision on the pending challenges to the "reconsideration rule." This case involves a challenge to EPA's decisions to amend the major source rule by (a) setting a minimum MACT floor of 130 ppm for CO as a surrogate for organic HAP emissions and (b) establishing and clarifying work practice standards during startup and shutdown periods. The DC Circuit upheld the portion of the rule relating to startup and shutdown periods but reversed and remanded to EPA the surrogate-CO standard for further clarification and justification. SLMA will work with its industry partners to help EPA finalize this standard.

**NHSM Rulemaking/ Litigation**

**Recent Developments.** None. On December 7, 2018, an industry coalition submitted a petition to the EPA requesting that it remove restrictions under the Non-Hazardous Secondary Materials (NHSM) rule, based on contaminant comparison criteria that are incompatible with recent court decisions. The Petition specifically asks for the removal of the "designed to burn" designation for creosote treated ties. The coalition believes that removal of the mandatory contaminant comparison criteria will result in the removal of the "percentage to burn" combustion limitation and date of construction restriction. Importantly, removal of the comparison criteria will allow more treated wood biomass to be categorically listed as boiler fuels.

On May 30, 2018, the EPA announced final rule changes to the definition of "Solid Waste" under the Resource Conservation and Recovery Act. The change vacates one of the criteria under which EPA uses to determine what materials fall under the definition of solid waste. EPA uses the same criteria for the NHSM rule, used to determine whether certain treated wood biomass can be listed as a boiler fuel. SLMA and its industry partners are working to encourage EPA to change the NHSM rule.

**Revised Ozone Standard**

**Recent Developments.** None. On August 1, 2018, EPA informed the Court that it will not proceed with the reconsideration of the 2015 Rule but will instead 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.

On September 14, 2018, the D.C. Circuit issued a ruling that voided portions of EPA's Implementation Rule related to measures that States must take to comply with the 2008 ozone standard. This Ruling creates considerable uncertainty for States going forward. It is likely to also complicate efforts by EPA to rely on the methods previously laid out in the 2008 implementation plan as it develops an implementation rule for the 2015 standards.

## CLEAN WATER ACT

***Prepared by Kilpatrick Townsend.***

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

**Recent Developments.** On February 14, 2019, EPA and the US Corps published its proposed replacement of the 2015 WOTUS Rule in the Federal Register. The agencies will be accepting comments on the Proposal until April 15, 2019. There is expected to be a massive number of comments submitted on the proposed scope of federal jurisdiction over waters of the U.S.

EPA states that it hopes that the Proposal would allow for a jurisdictional test that is clearer and easier to understand for the regulated community. The proposed rule establishes six categories of waters that would be considered "waters of the United States:"

- **Traditional navigable waters (TNWs):** Large rivers and lakes, tidal waters, and the territorial seas used in interstate or foreign commerce.

- **Tributaries:** Rivers and streams that flow to traditional navigable waters. These naturally occurring surface water channels must flow more often than just when it rains—that is, tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.

- **Certain ditches:** "Artificial channels used to convey water" would be jurisdictional where they are traditional navigable waters, such as the Erie Canal, or subject to the ebb and flow of the tide. Ditches may also be jurisdictional where they satisfy conditions of the tributary definition as proposed and either 1) were constructed in a tributary or 2) were built in adjacent wetlands.

- **Certain lakes and ponds:** Lakes and ponds would be jurisdictional where they are traditional navigable waters, or where they contribute perennial or intermittent flow to a traditional navigable water either directly or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream. Lakes and ponds would also be jurisdictional where they are flooded by a "water of the United States" in a typical year, such as many oxbow lakes.

- **Impoundments:** Impoundments of "waters of the United States" would be jurisdictional.

- **Adjacent wetlands:** Under the proposal, wetlands that physically touch other jurisdictional waters would be "adjacent wetlands." Wetlands with a surface water connection in a *typical year* that results from 1) inundation from a "water of the United States" to the wetland or 2) perennial or intermittent flow between the wetland and a "water of the United States" would also be "adjacent." Wetlands that are near a jurisdictional water but don't physically touch that water because they are separated, for example by a berm, levee, or upland, would be adjacent only where they have a surface water connection described in the previous bullet through or over the barrier, including wetlands flooded by jurisdictional waters in a typical year.

**Exclusions:** The proposal also clearly outlines what would not be "waters of the United States," including:

- Waters that would not be included in the proposed categories of "waters of the United States" listed above—this would provide clarity that if a water or feature is not identified as jurisdictional in the proposal, it would not be a jurisdictional water.
- Ephemeral features that contain water only during or in response to rainfall.
- Groundwater.
- Ditches that do not meet the proposed conditions necessary to be considered jurisdictional, including most farm and roadside ditches.
- Prior converted cropland.
- Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
- Wastewater recycling structures such as detention, retention and infiltration basins and ponds, and groundwater recharge basins would be excluded where they are constructed in upland.
- Waste treatment systems, including all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge).

- In October, a District Court in Texas issued a Stay of the 2015 WOTUS Rule pending the ongoing appeal over its merits. The decision blocks any enforcement of the WOTUS Rule during litigation over its merits within the states of Texas, Louisiana and Mississippi. These three states now join the 24 states listed below that also have received a Stay of the WOTUS Rule pending related litigation and rulemakings.

- On June 8, 2018, the U.S. District Court for the Southern District of Georgia issued a Stay of the 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.

**State Water Quality Criteria**

**Recent Developments.** None. 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.

On August 3, 2018, EPA issued a letter stating that it now intends to commence the reconsideration of its prior decision to partially disapprove the proposed water quality standards for the State of Washington.

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

## ENDANGERED SPECIES ACT

***Prepared by Kilpatrick Townsend.***

**ESA Regulatory Reform**

**Recent Developments.** None. On September 24, 2018, SLMA submitted comments, along with the Forest Landowners Association, supporting the proposed amendments to the ESA. On July 24, the Departments of the Interior and Commerce proposed amendments to ESA regulations for a 60-day comment period. The proposals adjust some long-standing rules and also revisit changes made by the Obama administration. Among other things, the proposal requests public comment on the following issues:

- Whether economic impact data would be useful at the time of listing (though the law will continue to prohibit the consideration of economic impacts in a listing decision);

- Restoring the pre-2016 rule that limits consideration of unoccupied areas as critical habitat to situations where there is inadequate occupied habitat; and

- Rescinding Interior's "Blanket Rule" that automatically gave threatened species the same protections as endangered species (Commerce has always considered whether to extend such protections at the time of listing).

**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.***

**Reminder to Post OSHA 300A Annual Summary**

At the end of each calendar year, all covered employers must review their OSHA 300 Logs (or equivalent form) to ensure that they are complete and accurate and must correct any deficiencies. A separate OSHA 300 Log must be completed for each of your establishments. At the end of each calendar year, all covered employers must also 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.

A "company executive" is defined as: 1) an owner of the company (only if the company is a sole proprietorship or partnership); 2) an officer of the corporation; 3) the highest-ranking company official working at the establishment; or 4) the immediate supervisor of the highest-ranking company official working at the establishment.

The OSHA 300A Summary must be posted no later than **February 1, 2019** and must remain posted until **April 30, 2019**. Employers must create and post the OSHA Form 300A Summary even if there were no recordable injuries. This posting requirement is separate from the requirement to electronically submit OSHA Form 300A data to OSHA under the electronic reporting rule, which will be discussed below.

## 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 deadline for covered employers to electronically submit the 2018 OSHA Form 300A data is March 2, 2019.** Employers may upload their 2018 Form 300A data and obtain additional information regarding the electronic reporting requirement at: https://www.osha.gov/injuryreporting/index.html.

**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.

**Combustible Dust Standard**

**Recent Developments.** In October 2018, the International Code Counsel formally accepted the recommendation of the American Forest & Paper Association (AF&PA) and American Wood Counsel (AWC) that prohibitions in the International Fire Code (IFC) against the use of compressed air to reduce combustible dust be amended to allow for its use consistent with National Fire Protection Association (NFPA) standards. However, according to the AF&PA/AWC, to the extent a conflict exists between the IFC and the NFPA standard, the IFC requirements will take precedence.

**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 complete a Dust Hazard Analysis ("DHA") 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.

## EMPLOYMENT LAW

***Prepared by Wimberly & Lawson, P.C.***

**Caution Necessary For Wellness Programs**

**Recent Developments.** Many employers are successfully using wellness programs and finding that good programs can be a "win-win." That is, employee wellness improves attendance and reduces healthcare plan costs, while showing the employer's desire to help workers. Unfortunately, there are many legal issues in setting up and operating a wellness plan. While the Affordable Care Act (ACA) encourages wellness programs, such plans must be "voluntary" to be legal under both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

**Background.** The Equal Employment Opportunity Commission (EEOC) had issued regulations supporting the use of company-sponsored wellness programs, including provisions allowing employers to offer a 30% reduction in individual health premiums for employees participating in voluntary wellness programs. The American Association of Retired Persons (AARP) filed a lawsuit against the EEOC regulations, contending that incentives up to 30% of the cost of an employee's health insurance premiums show that employee participation would not really be "voluntary." A federal judge last year ordered the EEOC to make some corrections to the regulations or the rules would have to be vacated by January 1 of this year. The EEOC did not make revisions, and instead removed the contested sections from its regulations in December.

Thus, at this time there is no "safe harbor" as to the incentives employers can offer to encourage voluntary participation in wellness programs. At the same time, a number of lawsuits have been brought by the

Department of Labor (DOL) against employers' welfare programs. Suits have been brought by the DOL against Macy's and subsidiaries of Cigna and Anthem over Macy's tobacco cessation program, and against Dorel Juvenile Group over its surcharge for participants who use tobacco products. Most recently, ChemStation was sued over its requirement to pay higher healthplan premiums for those who do not participate in its wellness program or fail to maintain certain health outcomes. Among other things, the lawsuit against ChemStation contends that the wellness plan did not offer any alternative standard by which participants could obtain the discounted premiums.

The bottom line is that wellness programs are subject to strict legal requirements. Although the EEOC says it plans to issue a new set of wellness regulations by mid-2019, this entire area is legally controversial and needs clarification.

## Dancers Sue Employer Claiming Reclassification as Retaliation

**Recent Developments.** Employers are well aware of classification issues as to whether workers are employees or independent contractors. Use of independent contractors offers great advantages to employers, including saving of payroll taxes and the avoidance of union and employment claims. On the other hand, there is widespread litigation over misclassification issues.

**Background.** One employer recently received the worst of both worlds. A class of exotic dancers in California sued their employer alleging their reclassification as employees and related reduction of pay was in retaliation for their previous lawsuit. Although the employer contended it was required to reclassify the dancers as a result of a California Supreme Court ruling, the dancers contended that the employer was not required to reduce their pay in the process. The case is *Jane Loes 1-3 v. SFBSC Management LLC*, Cal. Super. Ct., complaint filed 1/29/19.

Editor's Note: This lawsuit, if valid, puts employers in a "damned if you do, damned if you don't" situation. The lesson to be learned from the case is that hard facts may make bad law, and that employers should seek competent employment counsel in carrying out such reclassifications.

## NLRB Reverses Obama-Era Independent Contractor Test

**Recent Developments.** During the Obama administration, the NLRB overturned 92 traditional NLRB doctrines. The current Trump administration's NLRB is in the process of attempting to reverse the Obama-era rulings, thus going back to the prior doctrines.

**Background.** The latest example occurred in the January 25 ruling of the NLRB in *Super Shuttle DFW*, 16-RC-010963 (1/25/19). The latest ruling involves shuttle-van-driver franchisees in the Dallas-Fort Worth airport. Only employees are covered by the Labor Act, which provides them the right to unionize and engage in concerted activities. The Board during the Obama administration had particularly limited the use of independent contractors in its ruling that Federal Express Home Delivery drivers were not independent contractors, a ruling that was overturned by the District of Columbia Court of Appeals. In the recent ruling, the NLRB used the common-law test drawn from the Restatement of Agency, a legal treatise that names 10 factors to consider to determine whether a worker is an independent contractor or employee. Those factors include, among other things, the level of control the business exerts over a worker, the method of payment, and the amount of supervision involved in the job. The current ruling emphasizes that the Board should "evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." The current Board ruling was 3-1, broken down between Trump administration appointees and the sole remaining Obama administration appointee.

NLRB Chairman John Ring recently stated that the NLRB may propose a new regulation to resolve the resolution of the issue as between independent contractors and employees. The Board has already proposed a related rule dealing with the joint employment issue.

## Transportation Employers May Not Be Able to Require Mandatory Arbitration

**Recent Developments.** The Federal Arbitration Act is a federal law that encourages the arbitration of legal claims. Fifty-five percent of American workers are covered by mandatory arbitration provisions in their employment contracts with their employers, according to published reports. Many of these mandatory arbitration provisions preclude an employee from bringing a class or collective action and require all legal claims to be brought individually in arbitration rather than in court. The arbitration process is quicker and cheaper than court litigation, and prevents "runaway" juries.

**Background.** The current case involves whether the Federal Arbitration Act (FAA) can apply to transportation workers, as there is an exclusion in the FAA for "contracts of employment" of certain transportation workers. In a January ruling of the U.S. Supreme Court, the issue was whether this exclusion applied to workers who were independent contractors so that the exclusion for "contracts of employment" referred only to contracts that established an employer-employee relationship, and not to contracts with independent contractors. *New Prime, Inc. v. Oliveira*, No. 17-340 (U.S., 1/15/19).

The Supreme Court ruled that when Congress enacted the FAA in 1925, the term "contracts of employment" referred to agreements to perform work, whether to be performed by employees or independent contractors. Thus, under the exclusion from the FAA of certain transportation workers, the Court lacked authority under the FAA to order arbitration.

Editor's Note: The *New Prime* Supreme Court ruling does not affect employers of employees or independent contractors other than certain transportation workers in interstate commerce. However, trucking companies and related transportation employers will have to find other ways besides the FAA to enforce mandatory arbitration agreements. Most states have state arbitration laws that may be applicable, although a few states exempt arbitration agreements in employment contracts. Thus, employers of transportation workers have to rely on state arbitration laws to enforce their mandatory arbitration agreements. Some have expressed the view that other theories might be used to counter mandatory arbitration agreements of transportation workers in interstate commerce.

## Watch Out for Fair Credit Reporting Act Disclosure Acts

**Recent Developments.** The Fair Credit Reporting Act (FCRA) prohibits the use of consumer reports for employment purposes unless "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes, and that the consumer authorized the procurement of the consumer report in writing." Thus, job applicants must be given notice that the potential employer will run a background report on that individual as part of the application process, and the consumer must provide written authorization allowing the employer to request the background report. Further, the disclosure and authorization must be set forth in a separate stand-alone document.

**Background.** This seemingly simple requirement has resulted in numerous lawsuits against employers alleging this type of FCRA violation. Several lawsuits have been brought as class actions alleging that the job application included a waiver and release of liability on the same form that included a consumer report disclosure in violation of the FCRA. See *Syed v. M-1 LLC*, No. 14-17186 (C.A. 9, 1/20/17). In a ruling on January 29, 2019, an appellate court ruled that an employer who includes information on both state and federal credit reporting acts on the same document violates the FCRA's "stand-alone document" requirement. *Gilberg v. Cal. Check Cashing Stores*, No. 17-16263 (C.A. 9, 1/29/19).

Some of these cases have been defended on the basis that the plaintiff does not satisfy the injury requirement for standing to sue by alleging a "bare procedural violation" of the FCRA that does not result in concrete harm. See *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). However, the courts seem to be searching for ways in which a consumer job applicant may have been disadvantaged in the procedural process. The courts have differed on whether a breach of the stand-alone requirement is a bare procedural violation that does not satisfy the concrete injury requirement.

The requirement for stand-alone disclosure forms particularly gets complicated in the use of online applications. The courts have not yet issued rulings on how language presented in an online application can be "stand-alone" and caution is suggested to include the language by itself on its own page or "screen shot." There is potential in the cases for statutory penalties, punitive damages, and attorneys fee awards to a successful plaintiff.

Editor's Note: Employers need to be careful about meeting all the technical requirements of the FCRA, as plaintiffs can allege that confusing language in the background check disclosure forms, even those caused by shoddy grammar, can potentially make them invalid under the FCRA. Some courts have even found disclosure forms inadequate because they included unnecessary information that detracted from the disclosures they were required to provide.

## Campus Recruiting and Violation of Age Discrimination Laws

**Recent Developments.** Do employers violate the Age Discrimination In Employment Act (ADEA) in only recruiting at college campuses or turning away applicants for having too much experience? The Seventh Circuit has a simple answer to that question, in a ruling on January 23, 2019, that the federal age discrimination law does not protect older applicants from the unintended discriminatory effects of seemingly neutral employment policies. *Kleber v. Care Fusion Corp*., 2019 B.L. 21526 (C.A. 7, en banc 1/23/19).

**Background.** In this particular case, there was no question of disparate treatment of the applicant (i.e., intentional discrimination), but instead the claim was whether the ADEA applied to "disparate impact" or inadvertent discrimination cases, which nevertheless have an adverse effect on older applicants. The 8-4 decision by the full U.S. Court of Appeals for the Seventh Circuit reverses an April 27, 2018 ruling by a three-judge panel of the court. The disparate impact ruling was consistent with the Atlanta-based Eleventh Circuit ruling in *Villarreal v. R.J. Reynolds Tobacco Co*. case, thus avoiding a split in circuit court rulings that might have made it more likely for the Supreme Court to review the issue.

The Eleventh Circuit had ruled that an employer's instruction to recruiters that they should target candidates two to three years out of college and to avoid applicants with more than eight years' experience, did not violate the ADEA.

Editor's Note: Litigation of the issues may continue at least in other circuits. Further, employers should be aware that the ruling only deals with "disparate impact" situations, and not to cases involving intentional discrimination on the basis of age against job applicants. Further, the adverse impact type of case still protects existing employees (as opposed to applicants) from the "disparate impact" theory of employment discrimination.

In a related development, the U.S. Supreme Court ruled at the end of last year that the ADEA protects state and local government workers against age discrimination regardless of the size of their employer. *Mt. Lemmon Fire Dist. v. Guido* No. 17-587 (11/6/18). The ADEA was interpreted to cover all public sector workers, even though it only applies to private-sector employers with 20 or more employees.