May 2020 Regulatory Update

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

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COVID-19 Temporary EPA Enforcement Policy

Prepared by Kilpatrick Townsend.

On March 26, 2020, U.S. EPA's Office of Enforcement and Compliance Assurance issued a temporary policy on how the Agency would use enforcement discretion to address noncompliance with environmental requirements that results from the COVID-19 pandemic. The guidance is retroactive to March 13. Key points include:

- The policy is temporary but applies to actions/omissions that occur while it is in effect, event after the policy is terminated. Its duration will be reassessed on a regular basis, and EPA will provide at least seven days' notice of its termination.
- Generally, if compliance is "not reasonably practicable," facilities should:
  - Minimize the effects and duration of noncompliance, and
  - Identify and document the nature and dates of noncompliance, how COVID-19 caused the noncompliance, and the steps taken to return to compliance.
- EPA does not expect to seek penalties in situations where they agree that "COVID-19 was the cause of noncompliance" and the entity provides the supporting documentation to the EPA upon request.
- Once the policy is no longer in effect, EPA does not plan to ask facilities to "catch-up" missed monitoring or reporting if it pertains to a requirement with intervals of less than three months. For semi-annual or annual obligations, EPA expects entities to take reasonable measures to resume compliance activities as soon as possible and note the reason for the delay when submitting late information.
- The policy is not binding on States and their state-run environmental compliance programs.
- The policy also does not apply to criminal violations, Superfund and RCRA corrective actions, accidental releases, and imports.

CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood & Composite Wood Products MACT

Recent Developments. None. On October 21, 2019, SLMA and its industry partners including the American Wood Council, submitted comments on the Proposed Rule (discussed below) in support of EPA's decision to not change the program's requirements for the operation of lumber kilns.

Background. On August 22, 2019, EPA issued the Proposed Rule to update the PCWP Risk and Technology Review (RTR). As expected, it concludes that technology has not changed since the 2004 MACT was issued and that public health risks are acceptable within "an ample margin of safety." It also includes changes to the startup, shutdown and malfunction (SSM) provisions, testing and reporting requirements, as well as the issues the wood industry asked EPA to address concerning thermocouples, shutdown work practices, and biofilter averaging periods.

The Proposal did not address the remand MACT issues for lumber kilns for other equipment at wood product mills that will be addressed in a separate rulemaking at a later date. SLMA and its industry coalition have been engaging with EPA to discuss work practice standards that are flexible and reasonable for major source lumber producers.

Biogenic Carbon Emissions

Recent Developments. We understand that EPA has sent its long-awaited proposal for the establishment of criteria for biomass to be considered carbon neutral when burned for energy to the White House OMB. It is expected that the draft rule will undergo a 90-day internal review before being published for public comment.

On December 17, 2019, the House passed the FY2020 Appropriations Bill. As with the FY19, the FY2020 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. It is expected that a rule will be issued sometime this Spring to formally adopt the carbon neutrality policy.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

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

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

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

Now that the Final Rule has been published in the Federal Register, it is expected that numerous environmental groups will file legal challenges to the rule in federal courts across the nation.

Background.

- The Final Rule to repeal (step 1 of the two-step "repeal and replace" plan) the 2015 WOTUS Rule was published in the Federal Register on October 22, 2019. Multiple environmental groups have filed legal challenges to the final rule.

- On August 21, 2019, a federal district court in Georgia found that the 2015 WOTUS Rule is both substantively and procedurally unlawful and exceeded the agencies' authority in scope and reach. This is the first court decision to address the substantive elements of the 2015 Rule. The Court remanded the rule back to the agencies for revisions in light of the ongoing rulemakings to replace the 2015 Rule.

- On May 28, 2019, a federal court in Texas ruled that the 2015 WOTUS Rule violated the procedural requirements of the Administrative Procedures Act. The Court further remanded the rule to the EPA for reconsideration of the notice and comment procedures. Unfortunately, this decision has limited nationwide effect as there is now a patchwork of litigation and court-ordered stays issued across the U.S. (see below). It is believed that this decision only affects the case involving the states of Texas, Louisiana and Mississippi (the WOTUS Rule had already been Stayed in these states).

- In October 2018, 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 have also 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.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

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

- The Proposed Rule would simplify the definition of "effects" which must be evaluated by striking specific references to direct, indirect, and cumulative effects. Under the new definition, effects must be reasonably foreseeable and have a reasonable causal relationship to the proposed action or alternatives. This means that an effect must have a proximate causal relationship to the agency action to require evaluation. The Proposed Rule clarifies that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy chain.

- The Proposed Rule changes current policy by stating that analysis of cumulative impacts is not required under NEPA. As such, only the reasonably foreseeable effects of the actual project in question should be considered in the NEPA analysis.

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

In addition, on August 12, 2019, the Department of the Interior finalized a series of rules, to significantly revise the process and factors to be used when considering ESA listing decisions. Among other things, the rules would impact the following key issues within the ESA program:

- Agencies will be allowed to solicit and consider economic impact data as part of a species' listing decision;

- An agency's consideration of unoccupied areas as potential critical habitat for a species will be limited to situations where there is inadequate occupied habitat; and

- Species designated as "threatened" will no longer be required to receive the same level and types of protections as "endangered" species.

- The concept of the "foreseeable future" will be shortened in time and scope such that potential threats to a species such as climate change are no longer required to be considered.

The changes to the ESA would only impact *future listing* decisions. At least 17 states and multiple environmental groups have filed legal challenges to the recently issued final rule.

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

Recent Developments. Multiple parties have filed notices of appeal of the decision discussed below, including the federal agencies and the industry-group intervenors.

On January 28, 2020, the D.C. Circuit issued its long-awaited Opinion on the challenges to the January 2016 listing of the NLEB as a "threatened" (as opposed to "endangered") species. Because the NLEB was listed only as threatened, the Agencies had issued a specially tailored rule under Section 4(d) of the Endangered Species Act that provided more flexibility to impacted landowners and industry. Multiple environmental groups challenged both the listing and the 4(d) Rule. The D.C. Circuit held that the Agencies failed to properly consider all available information and remanded the Rule back to the Agencies for further consideration. The Court also found that the Agencies did not follow the proper administrative procedures for the prior rulemaking process.

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

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

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

OCCUPATIONAL HEALTH & SAFETY ACT

Prepared by Kilpatrick Townsend.

OSHA COVID-19 Guidance for Manufacturing Industry

On April 16, 2020, OSHA issued a safety alert for employers in manufacturing industries to protect employees from coronavirus exposure in the workplace. OSHA's recommendations include:

- Practicing sensible social distancing and maintaining a minimum of six feet between workers when possible;
- Establishing flexible working hours or staggered shifts, if feasible, to reduce the number of individuals on the worksite at any given time and enable workers onsite to more effectively practice social distancing;
- Instructing employees to stay home if they feel sick;
- For work activities where social distancing may be challenging, consider limiting the duration of those activities or other creative solutions, like temporarily moving or repositioning work stations to create more distance between workers, or where feasible, engineering solutions like installing physical barriers (e.g. plastic sneeze guards);
- Training workers on how to properly put on, use, wear, remove, and maintain protective clothing and equipment;
- Allowing workers to wear masks that cover the nose and mouth to prevent virus transmission;
- Regularly monitoring COVID-19 public health recommendations for the workplace and ensuring that information is shared with workers;

- Using Environmental Protection Agency-approved cleaning materials from List N or that have label claims against the coronavirus (List N is accessible at: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2);
- Promote personal hygiene. If workers do not have access to soap and water for handwashing, provide alcohol-based hand sanitizer containing at least 60% alcohol;
- Provide disinfectants and disposable towels that workers can use to clean work surfaces;
- Encourage workers to report any health and safety concerns.

The alert and additional OSHA COVID-19 resources are available at https://www.osha.gov/SLTC/covid-19/.

OSHA Interim Enforcement Response Plan for COVID-19

On April 13, 2020, OSHA issued an Interim Enforcement Response Plan outlining the Agency's handling of COVID-19 related complaints, referrals, and severe illness reports. Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections, with special attention given to healthcare organizations and first responders.

All other formal complaints from employees engaged in medium or lower exposure-risk tasks and complaints from non-healthcare and non-emergency response establishments generally will be processed through the non-formal complaint process. Under the non-formal process, OSHA provides a letter to the employer describing the employee's complaint. The employer is expected to investigate the complaint allegations and make any necessary corrections and modifications. Within five working days of the conclusion of the employer's investigation, the employer must advise the Area Director in writing by email or fax of the investigation results and provide supporting documentation. If the employer fails to respond or OSHA finds the employer response inadequate, an inspection may be scheduled.

The Interim Enforcement Response Plan takes effect immediately and will remain in effect until further notice. It is intended to be limited to the current public health crisis. Additional information regarding the OSHA Interim Enforcement Plan is available at: https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

Workplace Injuries & Illnesses Recordkeeping

Recent Developments. On April 10, 2020, OSHA issued additional guidance for recording COVID-19 cases. Generally under OSHA's recordkeeping requirements, COVID-19 is a recordable illness if the case:

1. Is confirmed as a COVID-19 illness;
2. Is work-related as defined by 29 CFR 1904.5; and
3. Involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

OSHA recognizes that in areas where there is ongoing community transmission, employers outside of the healthcare industry, emergency response organizations, and correctional institutions may have difficulty determining whether an employee contracted COVID-19 through a workplace exposure. Therefore, until further notice, OSHA will not enforce its recordkeeping requirements with respect to work-relatedness determination for employers outside of the industries above unless:

1. There is objective evidence that a COVID-19 case may be work-related; and
2. The evidence was reasonably available to the employer.

This OSHA enforcement policy is intended to provide certainty to regulated employers and encourage employers to focus their efforts on implementing good hygiene practices and mitigating COVID-19's effects, rather than making difficult work-relatedness determinations in areas where there is community transmission. Additional information regarding the COVID-19 recording requirement is available at: https://www.dol.gov/newsroom/releases/osha/osha20200410-2 *(Note: copy and paste this link directly into your browser.)*

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).

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 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 upgraded every five years.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

DOL Issues Temporary Regulations

Recent Developments. On April 1, 2020, The U.S. Department of Labor (DOL) issued a temporary rule to implement the Public Health and Emergency and Paid Leave Provisions.

Background. There are several areas in these regulations that had not previously been addressed in detail, including the type notice an employee must provide the employer, the documentation the employer may require of the employee to provide as to the need for such leave, recordkeeping, and the determination of whether the employer meets the small employer exemption. The most important particulars of the regulations are summarized below:

1. Employees subject to the new family and medical leave and paid leave provisions may not take paid leave where the employer does not have work for the employee available.
2. Employees subject to a quarantine or isolation order that are able to telework, and therefore may not take paid sick leave if: (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform the work from another location; and (c) there are no extenuating circumstances that prevent an employee from performing that work.
3. In determining whether an employee is unable to work because he/she has been advised by a healthcare provider to self-quarantine for a COVID-19 reason, the advice to self-quarantine must be based on the healthcare provider's belief that the employee has COVID-19, or may have COVID-19, or is particularly vulnerable to COVID-19, and the self-quarantine must prevent the employee from working.
4. An employee experiencing COVID-19 symptoms may take paid sick leave for time spent making, waiting for, or attending an appointment for a test for COVID-19, but the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis. An employee who is unable to telework may continue to take paid sick leave while awaiting a test result. In the case of an employee who exhibits COVID-19 symptoms and seeks medical advice but is told that he does not meet the criteria for testing and is advised to self-quarantine, he/she is eligible for leave provided he meets all the other requirements.
5. In the case of an employee who is unable to work because he/she needs to care for an individual who is subject to a quarantine or isolation order, or who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, the employee must have a genuine need to care for the individual. Such paid leave may not be taken to care for someone with whom the employee has no personal relationship. The individual being cared for must be an immediate family member, roommate, or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person.
6. In determining the need for leave, the normal rules apply in determining the employee's salary basis for purposes of exemption from overtime under the white-collar rules.
7. Any time taken by an eligible employee under the expanded family and medical leave (regarding caring for a child whose school or daycare is closed) counts toward the 12 work weeks of FMLA leave to which the employee is entitled. Thus, during this expanded family and medical leave, the employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies that would be available to the employee to care for a child, such as vacation or personal leave, or paid time off concurrently with the expanded family medical leave. Because this period of expanded family and medical leave is not unpaid, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the eligible employee nor the employer may require the substitution of

paid leave. However, employers and eligible employees may agree, where Federal or state laws permit, to have the employer's paid leave policy supplement pay under the expanded family leave so that the employee receives the full amount of his or her normal pay. For example, an eligible employee and employer may agree to supplement the expanded family and medical leave by substituting one-third hour of accrued vacation leave for each hour of expanded family and medical leave. If the eligible employee and employer do not agree to supplement paid leave in the manner described above, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan for later use.

8. In determining the regular rate to the employee for paid leave, the employer must average the employee's regular rate over multiple work weeks, which DOL has determined as a six-month period or over the entire term of employment where less than six months.

9. In determining whether an employee is eligible for the expanded family and medical leave, if employee is laid off or otherwise terminated on or after March 1, 2020, he/she is nevertheless considered to have been employed for at least 30 calendar days, provided the employer rehires or otherwise re-employs the employee on or before December 31, 2020, and the employee has been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or otherwise terminated.

10. In determining whether an employer has 500 or more employees at the time leave is requested, the employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed, and day laborers supplied by a temporary placement agency, but not independent contractors. Nor do employees count who have been laid off and have not subsequently been re-employed.

11. In determining whether an employer meets the small employer exemption, the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, poses a substantial risk, or prevents the small employer from operating at minimum capacity, respectively. Such a small employer must document the facts and circumstances the meet the criteria and justifies such denial, and retain such records in its own files.

12. Regarding intermittent leave, one basic condition is that all employees and their employer must agree on the use of intermittent leave under the recent legislation. If an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. An employee normally may not take such intermittent leave at the employer's worksite, except that the employee and employer may agree to take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, because of reasons related to COVID-19.

13. Regarding an employee's notice to the employer regarding the need to take leave, an employer may require employees to follow reasonable notice for procedures as soon as practical after the first work day or portion of a work day for which an employee receives paid sick leave in order to continue to receive such leave. It is reasonable to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered, but the employer may not require a notice to include documentation by what is allowed and discussed in the next paragraph. It is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

14. Regarding documentation of the need for a leave, such documentation must include a signed statement containing the following information: (a) the employee's name; (b) the date(s) for which leave is requested; (c) the COVID-19 qualifying reason for leave; and (d) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. For example, an employee might have to provide the name of the government entity that issued a quarantine or isolation order; the name of the healthcare provider that advised him to self-quarantine for COVID-19 reasons; the name of the child being cared for; the name of the school, place of care, or childcare provider that closed or became unavailable due to COVID-19 reasons; a statement representing that no other suitable person is available to care for the child during the person of requested leave; or the normal FMLA certification related to a serious health condition.
15. The new statute does not protect an employee from employment actions, such as lay-offs, that would have affected the employee regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if he/she had not taken leave.
16. Concerning recordkeeping, an employer is required to retain all documentation provided by the employee for four years, regardless of whether leave was granted or denied. Similarly, even if an employee provided oral statements, the employer is required to document and retain such information for four years. If an employer denied an employee's request for a leave pursuant to the small business exemption, the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years. Also, there are documents the employer should create and retain to support its claim for tax credit.
17. In terms of enforcement, enforcement action is similar to the FMLA except that an employee can only bring an action against an employer if the employer has 50 or more employees working in the current or preceding year. Enforcement is otherwise initiated by the DOL.

Traps to Avoid in Obtaining PPP Loan Forgiveness

Recent Developments. The Paycheck Protection Program (PPP) allows certain employers (primarily those with less than 500 employees) to obtain low cost (1% interest), short-term (2 years) financing from the federal government for certain operating expenses consisting of payroll costs, interest on certain loans (not principal), rent on real and personal property, and certain utilities.

Background. The limitation on the use of the loan proceeds means that employers cannot use the money to pay suppliers, contractors, or insurers.

In addition, recent regulations impose a requirement that is not in the statute—75% of the loan proceeds must be spent on certain payroll costs to qualify for forgiveness. This requirement ignores the fact that many businesses in normal times do not spend 75% of their revenue on payroll costs and those businesses may not survive if their obligations are not paid.

Furthermore, not all of an employer's payroll costs are counted in determining loan forgiveness. For example, the maximum cash compensation (salary, wages, vacation pay, etc.) that can be considered for loan forgiveness purposes is approximately $1,923 per employee per week. Moreover, the employer's share of FICA and other federal taxes cannot be treated as payroll costs for loan forgiveness purposes.

Staff reductions also may reduce the amount of loan forgiveness.

These and other potential traps may be avoided with proper planning and legal advice.