May 2021 Regulatory Update

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REGULATORY REFORM

Prepared by Kilpatrick Townsend.

Biden Administration Issues a "Regulatory Freeze" of all Pending EPA Rulemakings

Recent Developments. None. On January 20, 2021, the Biden Administration imposed a "regulatory freeze" to allow for review of all recent rules and/or agency guidance that had not yet taken effect. This regulatory pause has been enacted by every new White House administration over the last 20 years. The "regulatory freeze" prevents recently finalized rules from taking effect if the effective date has not yet occurred. A number of the regulatory actions discussed below having been impacted by the "regulatory freeze."

In addition, the new administration has directed the EPA to review and potentially revise a large number of rules that had been finalized and became effective under the prior administration.

EPA Regulatory Science Transparency Rule

Recent Developments. None. On February 1, 2021, a federal court in Montana struck down the Trump Administration's recent "science rule" on procedural grounds due to the immediately-effective manner in which the prior administration had issued the rule. The Biden Administration is widely expected to abolish the prior rulemaking and not seek its reinstatement.

Background. The Trump Administration's "Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information" rule was intended to require EPA to give greater consideration to scientific studies used to support significant regulations or influential scientific information where the underlying dose-response data are available in a manner sufficient for independent validation. The rule also: required EPA to identify and make publicly available the science that serves as the basis for significant regulations at the proposed or draft stage to the extent practicable; reinforced peer review requirements for pivotal science; and provided criteria for the EPA Administrator to exempt certain studies from the requirements of the rule.

Critics of the rule contend that the real intent of the rule is to make it more difficult to use scientific studies that rely on confidential research information, such as patients' personal medical records and details, in certain rulemakings. Multiple organizations have already filed appeals to the rule on both substantive and procedural grounds. It is also expected that the Biden Administration will consider a prompt repeal of the rule.

CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood & Composite Wood Products MACT

Recent Developments. On April 13, 2021, EPA and other parties to the pending lawsuit submitted a Joint Motion to the Court to establish November 16, 2023 as the deadline for EPA to finalize the PCWP MACT. The Court is expected to approved the filing.

EPA has also informed the wood products industry that it is considering conducting HAP emission tests from certain wood product mill equipment as part of its effort to complete the PCWP MACT. SLMA is working with its industry partners on the potential action.

On October 13, 2020, several environmental groups petitioned the U.S. EPA to take action on the PCWP MACT. Petitioners assert that the agency has failed to set emission limits for unregulated hazardous air pollutants (HAPs), as well as process equipment such as kilns at lumber mills. In response to the Petition, SLMA and several other industry coalitions filed a Motion to Intervene in the case on November 12, 2020. EPA has filed a motion to hold the case in abeyance for 120 days to allow for time to consider the petitioner's request.

On August 13, 2020, EPA published it's Final Rule to update the PWCP Risk and Technology Review (RTR). Consistent with the previously proposed rule, the Final Rule concludes that control technologies for HAP emissions for the PCWP industry have not changed since the 2004 MACT was issued and that public health risks are acceptable within "an ample margin of safety." Based on this, the agency did not identify any new control technologies that should be considered when EPA revisits the PCWP MACT (EPA is currently working on the MACT rulemaking).

SLMA and its industry coalition have engaged with EPA regarding the upcoming MACT rulemaking and will continue to pursue dialogue with the agency in order to ensure that the MACT includes work practice standards that are flexible and reasonable for major source lumber producers. EPA is not expected to make any substantive proposals on the MACT rule until mid-2021.

Revised Ozone Standard

Recent Developments. The Biden Administration has "frozen" the December 2020 rulemaking in order to allow time for the new administration to conduct a review. Environmental groups have also filed legal challenges to the previously issued rule. It is expected that the litigation will be stayed during the new administration's review.

On December 23, 2020, EPA finalized its plans to retain the 2015 primary and secondary Ozone NAAQS going forward at the current 70 parts per billion standard. The action became effective upon publication of the final rule in the Federal Register on December 31, 2020.

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

Recent Developments. EPA is reported to be taking steps to void the December 2020 rulemaking. The Biden Administration has "frozen" the December 2020 rulemaking in order to allow time for the new administration to conduct a review.

Background. On December 9, 2020, EPA finalized and signed its final rule for "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Rulemaking Process." The Rule establishes a standardized process for considering costs and benefits when the agency considers rulemakings under the Clean Air Act.

Although longstanding presidential orders requiring cost-benefit balancing date back to 1981, one of the greatest impediments to implementation of the cost-benefit executive orders has been regulatory agencies such as EPA often have interpreted their statutes to limit their ability to fully engage in cost-benefit balancing and thus to comply with the longstanding presidential directives do more good than harm. We understand EPA Administrator Wheeler has also recently stated that the Agency plans to follow with similar cost-benefit rules for the water, land and chemical programs over the next three years.

"Once In, Always In" Policy

Recent Developments. None. The Biden Administration has "frozen" the November 2020 rulemaking in order to allow time for the new administration to conduct a review.

Background. On November 19, 2020, the U.S. EPA published its Final Rule for the termination of the agency's longstanding "once in, always in" policy. This policy has historically prevented "major" sources of hazardous air pollutants ("HAP"), i.e., those with the potential to emit greater than 10 tons per year of any single HAP or 25 tons per year for all HAPs, from *ever* being considered a minor/area source even if such source reduced their HAP emissions below the major source levels. EPA's final action now allows a major source to reduce its emissions below the significant source threshold and then opt out of the Title V permitting process (with respect to HAPs) and other programs directed at major sources only.

Climate Change Regulation

Recent Developments. None. On January 19, 2021, the D.C. Circuit vacated and remanded the Trump-era Affordable Clean Energy Rule (ACE). The Court's remanding of the rule back to EPA for further consideration will provide the Biden Administration leverage to potentially abandon the ACE and seek to reinstate and/or revise the Obama Administration's 2015 Clean Power Plan which strictly limited potential greenhouse gas emissions from *newly* constructed *coal-fired* power plants.

Biogenic Carbon Emissions

Recent Developments. None. On January 19, 2021, the D.C. Circuit vacated and remanded the Trump-era Affordable Clean Energy Rule (ACE). The Court's remanding of the rule back to EPA for further consideration will provide the Biden Administration leverage to potentially abandon ACE and seek to reinstate and/or revise the Obama Administration's 2015 Clean Power Plan which strictly limited the potential greenhouse gas emissions from *newly* constructed *coal-fired* power plants.

On December 17, 2020, the House passed the FY20 Appropriations Bill. As with the FY19 Bill, the FY20 Bill emphasized the key role that forests play in addressing the energy needs of the United States. The Bill directed the DOE, DOA, and U.S. 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 solutions, including policies that reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source.

Proposed Startup Shutdown Malfunction ("SSM") SIP Call Rule

Recent Developments. None. The Biden Administration has "frozen" the October 2020 EPA action in order to allow time for the new administration to conduct a review. On October 9, 2020, EPA issued guidance that addresses the general permissibility of SSM provisions in SIPs under the text and structure of the Clean Air Act.

Background. On April 24, 2017, the D.C. Circuit granted EPA's request to *indefinitely* delay oral arguments regarding the pending challenges to the SSM Rule. Although the litigation continues to be stayed indefinitely, EPA has recently taken actions in Texas and North Carolina that could indicate a willingness to abandon the previously issued 2015 SSM Rule.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. Newly appointed EPA Administrator Michael Regan offered comments to the Senate indicating that the may seek to find a compromise on the heavily disputed and litigated definition of "Waters of the U.S." He did not provide further details.

The Biden Administration is seeking the Stay of all pending litigation related to the WOTUS Rule in order to allow time for the new administration to review and potentially reconsider the rulemaking.

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

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

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

Industrial Stormwater General Permitting

Recent Developments. None. On February 19, 2021, EPA published its final *Multi-Sector General Permit for Industrial Stormwater Discharges*. SLMA and its industry partners had previously submitted comments on the proposed rule in May 2020, and it appears that the final rule addresses a number of the concerns raised on those comments. The Multi-Sector General Permit authored by EPA is used as a guide to state agencies in the issuance of storm water permits for facilities such as sawmills and wood treating operations.

The final rule is currently "frozen" for review by the Biden Administration. In addition, the final rule is potentially subject to litigation by NGOs once it is cleared by the new administration.

ENDANGERED SPECIES ACT (ESA) & NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Prepared by Kilpatrick Townsend.

ESA and New Definition of "Habitat"

Recent Developments. The Biden Administration has "frozen" the December 2020 USFWS action in order to allow time for the new administration to conduct a review.

Background. On December 15, 2020, the USFWS finalized a definition for the term "habitat" under the ESA. The action is the result of the 2018 Supreme Court decision that noted the ESA's lack of a definition for the term which complicated any attempt to classify areas as "critical habitat." SLMA joined comments submitted by its industry partners on this issue in early September. The final definition for "habitat" is as follows:

> *"For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes."*

The definition will only be used going forward and the agency will not use the new definition to reevaluate previous decisions on critical habitat. Critics of the definition contend that it will limit the ability of the agency to designate areas that are likely to be needed in the future for the survival of the species as critical habitat.

NEPA Regulatory Reform

Recent Developments. None. The Final Rule became effective on September 14, 2020; however, several lawsuits have been filed which seek to halt the implementation of the rule. In addition, the Biden Administration has stated that it intends to review and possibly repeal the recent rule.

Background. On July 15, 2020, the Trump Administration issued a final rule to complete the proposed rulemaking discussed below. In addition to the significant changes to NEPA discussed below, the Final Rule also established several other significant program changes including:

- A 2-year limit on the time that can be spent conducting an environmental review (historically, NEPA reviews often take up to 4 years), and

- Agencies may now develop categories of activities that require no environmental assessment at all.
- The Rule simplifies 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 actions or alternatives. This means that an effect must have a proximate causal relationship to the agency action to require evaluation. The Rule clarifies that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain.
- The 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.

Designation of Critical Habitat for the Black Pine Snake

Recent Developments. None. The Forest Landowners Association (FLA) has filed a lawsuit challenging the U.S. Fish and Wildlife Service's designation of critical habitat for the black pine snake. The lawsuit alleges that the Service designated thousands of acres of private land as critical habitat based off insufficient scientific evidence and without fully considering the impact on private landowners and forest businesses. The suit alleges that the critical habitat designation sets a precedent for future designations and punishes the voluntary conservation efforts of forest landowners nationwide.

On November 13, 2018, SLMA joined comments submitted by the FLA on the USFWS' reopening 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.

Proposed Listing of Northern Long-Eared Bat (NLEB)

Recent Developments. None. On March 1, 2021, the D.C. District Court established an 18-month deadline for USFWS to issue a new proposed rule and final listing determination for the NLEB within 18 months after the completion of the Species Status Assessment (SSA) for the species, which is currently in process. USFWS states that it expects the SSA to be complete "by May 2021," which would push the new proposed rule into late 2022.

On February 23, 2021, SLMA joined comments submitted by NAFO to the USFWS regarding the agency's initiation of its 5-year "status review" of the NLEB. The comments urged the agency to retain the species' current "threatened" status and not elevate its status further to "endangered."

Background. On January 28, 2020, the D.C. Circuit issued its 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.

OCCUPATIONAL SAFETY & HEALTH ACT

Prepared by Kilpatrick Townsend.

OSHA Inspections Drop 35% in Fiscal Year 2020

Recent Developments. In FY20, OSHA conducted 21,674 workplace inspections, a 36% decrease from the 33,393 OSHA inspections conducted in FY19. The drop is likely attributable to the COVID-19 pandemic. The top 10 OSHA violation in FY20 were:

1. Fall Protection—General Requirements (1926.501)
2. Hazard Communication (1910.1200)
3. Respiratory Protection (1910.134)
4. Scaffolding (1926.451)
5. Ladders (1926.1053)
6. Lockout/Tagout (1910.147)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection—Training Requirements (1926.203)
9. Personal Protective and Life Saving Equipment—Eye and Face Protection (1926.102)
10. Machine Guarding (1910.212)

Reminder to Post OSHA Form 300A Annual Summary for 2020

At the end of each calendar year, all employers, except those who are exempt from OSHA's recordkeeping requirements, 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 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 300A Summary form 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, 2021** and must remain posted until **April 30, 2021**. Employers must create and post the OSHA 300A Summary even if there were no recordable injuries.

Workplace Injuries & Illnesses Recordkeeping

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 Occupation Safety and Health Act states that "n[o] citation may be issued… after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

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

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work-related as defined by 29 C.F.R. § 1905.5; and
3. The case involves one or more of the general recording criteria set forth in 19 C.F.R. § 1904.7.

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

Electronic Workplace Injuries & Illnesses Reporting

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 hospitalization 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 annual 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 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.

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. The notice requirement may be satisfied by posting the *OSHA Job Safety and Health—It's the Law* worker rights poster from April 2015 or later. In addition, the employer must ensure that its procedure for reporting work-related injuries and illnesses is reasonable and does not deter or discourage employees from reporting. The OSHA Injury Tracking Application and additional information regarding the electronic reporting requirement are available at: https://www.osha.gov/injuryreporting/.

Amputation

Recent Developments. None.

Background. On August 13, 2015, OSHA updated its National Emphasis Program ("NEP") on amputations to include the following targeted industries: "Sawmills," "Wood Preservation," "Wood Window and Door Manufacturing," "Cut Stock, Resawing Lumber, and Planing," "Other Millwork (including Flooring)," and "Wood Container and Pallet Manufacturing." If an employer in one of the targeted industries reports an amputation, it will be subject to an inspection under the Amputations NEP. The contents of the 2015 Amputations NEP are available at: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-019_2.pdf. On December 10, 2019, OSHA revised the NEP targeting methodology. The updated NEP is available at: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-022.pdf

Electric Arc

Recent Developments. None.

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

Combustible Dust Standard

Recent Developments. None.

Background. OSHA has been in the process of developing a comprehensive general industry standard to address combustible dust hazards since 2009. In 2017, the proposed standard was removed from the federal regulatory agenda. While a dedicated combustible dust standard is no longer a priority for OSHA at this time, the agency retains authority to cite employers for combustible dust hazards under the "general duty" to provide a workplace "free from recognized hazards that are causing or 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").

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Rejection of Union by Amazon Workers

Recent Developments. In the most closely watched union representation election in at least a decade, Amazon workers at its warehouse in Bessemer, Alabama, defeated the Retail, Wholesale and Department Store Union, with 1,798 no votes to only 738 yes votes, along with approximately 500 challenged ballots that will not be counted because it would not effect the results.

Background. Statistically, counting all eligible voters, the results mean that fewer than 16% voted to join the union. This was a crushing defeat for the union, particularly since it was endorsed by President Biden and many other political officials, including a well-known Republican (Sen. Rubio). The largest two private employers in the country, Amazon and Walmart, have no union representation, and thus that situation will not change.

The union, following its crushing defeat, tried to make the most of a very bad situation. It claims that Amazon "interfered with the right of its . . . employees to vote in a free and fair election," and is using the defeat to encourage support for the PRO Act, a massive pro-union bill that passed the House of Representatives narrowly along party lines. Among other things, the union claimed that the installation of a mailbox on the warehouse property would lead voters to believe that Amazon would play a role in collecting and counting votes, and that the holding of mandatory anti-union meetings by Amazon were coercive. The union also accuses Amazon of spreading false information about the mandatory union dues, since employees can opt out of dues payment in a "right-to-work" state.

Such "captive audience meetings" are totally legal under current law, although would be prohibited by the PRO Act. Similarly, the PRO Act would void state "right-to-work" laws.

It was hard for the union to campaign on the idea of negotiating for more money or benefits for the workers, since Amazon starts its workers at $15.00 per hour, twice the state minimum wage, and has good benefits. In contrast, Amazon was likely able to point to various union contracts in the state with much lower pay and benefit levels. On the other hand, Amazon runs a highly efficient and technology-enhanced warehouse, and undoubtedly some workers felt they had to work too hard or had too much mandatory overtime without significant notice or had long walks to the break room that cut into their breaks over 10-hour shifts. But, as one worker said, "A lot of us are in agreement that we don't need anybody there to speak for us and take our money." As stated by Amazon in a blog post, "It's easy to predict the union will say that Amazon won this election because we intimidated employees, but that's not true. Our employees heard far more anti-Amazon messages from the union, policy-makers, and media outlets than they heard from us."

Currently, unions represent just 6.3% of U.S. private-sector workers, down from 24.2% in 1973. On the other hand, about 40% of public-sector workers are represented. To show the different reaction by persons in Congress, Sen. Bernie Sanders said that the Amazon vote showed that legislation is needed "that finally gives workers a fair chance to win organizing elections." Sen. Tommy Tuberville said the vote showed workers "value their right-to-work" protections."

Editor's Note: Employers should not be too giddy about the Amazon election results, in part because the current administration is living up to President Biden's promise to be the most "pro-union President" in history. The changes at the National Labor Relations Board (NLRB) have been rapid and remarkable, basically unprecedented. The PRO Act, were it to pass in the Senate, would make things much worse for employers. Moreover, public opinion polls such as Gallup show the public feels more favorably towards unions today than in many years. The pandemic has resulted in many non-union walkouts and the like, such as protesting working hours and pay, situations in which unions can find support. Union organizers have basically not been as active during the pandemic, because of fear of contagion, but that situation is rapidly coming to an end. One interesting observation of the Amazon election, however, is that the voting employees were overwhelmingly minorities, and unions sometimes assume that they can gain more support among minorities. This assumption proved wrong at Amazon.

PRO Act Suppresses Employee Right to Vote

Recent Developments. This writer is from Georgia, where a recently passed state law has been accused by media of discouraging voting by minorities. While this writer believes this claim is overstated at best, and false at worse, as evidenced by the fact that both Democrat activist Stacey Abrams and Republican former President Trump believe that recent elections in Georgia did not have sufficient safeguards. However, the subject of this article is not the Georgia state election laws, but the fact that massive media attention is being given to the claim that Georgia election laws discourage minority voting, while no one, and certainly not the press, seems to be interested in the massive discouragement of voting in union elections under the PRO Act.

Background. Traditionally, secret ballot union elections conducted by the NLRB are held on company property, which thereby allows easy access to voters. As a matter of fact, NLRB statistics show that about 98% of eligible employees vote in secret ballot elections held on company property.

The PRO Act expressly prohibits employee voting on company property and instead says that voting must be conducted by mail, or in some cases at locations away from company property. It would be hard to imagine a greater restriction on voting. Let's take the example of the recent Amazon election. As stated by an Amazon spokeswoman, "We said from the beginning that we wanted all employees to vote and proposed many different options to try to make it easy . . . The [union] fought those at every turn and pushed for a mail-only election, which the NLRB's own data showed would reduce turnout. This mailbox—which only the USPS had access to—was a simple, secure, and completely optional way to make it easy for employees to vote, no more and no less." Even in

the most publicized and important union election in a decade, only 55% of the eligible voters at Amazon voted. Had the election been held on company property, more than likely the normal 98% would have voted. And yet, the PRO Act prohibits voting on company property and basically advocates mail balloting, where only a little over half of the voters actually participate.

To make the point directly, why is it that the media accuses the State of Georgia of restrictive voting while making no mention of arguably the greatest suppression of voting in history in terms of the PRO Act?

Politics Risky Business for CEOs

Recent Developments. "Politics is Risky Business for CEOs" is a headline that appeared in the Opinion Section of the Wall Street Journal. The writer of the article, former CEO of American Express, advises that executives should not take a company position on public-policy questions that do not directly affect their business.

Background. Among other things, the article points out that whatever political statements are made, it will alienate many employees and customers. In discussing executives expressing such opinions on political issues, the Economist magazine reports that: "They enjoy little upside and risk plenty of downside."

A current example of the danger of public statements on political issues involve the CEOs of Atlanta-based Coca-Cola and Delta Airlines. Those CEOs publicly announced their disapproval of the Georgia legislation, involving themselves in a process that led to announced boycotts by persons of all political persuasions. The left announced a boycott because the two companies were headquartered in Georgia, and the right, including former President Trump, announced a boycott because of the claim that the announcements were false and further resulted in great harm to the State of Georgia, including a movement of certain economic activities out of the state. Consider more neutral comments made by officials of the Augusta National, which held the Masters Golf Tournament in Georgia in April. Those statements generally said that Augusta National supports the right to vote but does not wish to have political issues involved in the sport of golf. Such more neutral statements are less likely to offend anyone.

Note that Congress long ago banned companies from making direct political contributions to federal candidates and political parties, but admittedly executives are allowed to take a stand on broad public policy issues that do not identify any particular candidate or advocate for or against any particular legislation of government rule.

President Biden's Infrastructure Bill

Recent Developments. President Biden is in the process of proposing his second multi-trillion dollar bill, on infrastructure, with a third multi-trillion dollar bill to follow thereafter. Unlike President Obama's infrastructure bills, the infrastructure bill produced in April, called the American Jobs Plan, would require employers benefitting from an infusion of infrastructure funds to pay prevailing wages and stay neutral in union organizing efforts.

Background. The proposal can be as far reaching as the PRO Act since as many as one in every four workers is associated with a federal contractor. The legality of a union-neutrality clause might be legally attacked in court on the grounds that it is pre-empted by the National Labor Relations Act, but the President's decision to fire a Trump-appointed NLRB General Counsel in the first 23 minutes of holding office, shows his intent to carry out his campaign promises of being the most pro-union American President in history, regardless of potential legal risks. In contrast, President Obama's infrastructure bills did not include the addition of policies aimed at increasing union membership. The President may have a greater opportunity of moving forward in his pro-union agenda in the infrastructure bill, because the Administration may need only a majority vote instead of the 60-vote margin required under the Senate's filibuster rules. The strongest opposition to the Biden infrastructure bill may come from the 33% increase in corporate income taxes (21% to 28%) he proposes to pay for it, while some progressive Democrats demand that it does not spend nearly enough.

Senate GOP Leader Mitch McConnell calls Biden's plan a "Trojan Horse" for tax hikes and liberal social policy changes having nothing to do with infrastructure. There are further complications because a number of progressive Democrats in the Northeast will not support the bill without ending the cap imposed on state and local tax deductions, a change which would only benefit the very rich. Some also argue that these multi-trillion dollar federal programs will add more heat to a hot economy, resulting in inflation and other adverse consequences, a position held by President Obama's Economic Advisor, Lawrence Summers.

EEO-1 Reporting Deadline

Recent Developments. After a brief hiatus due to the COVID-19 health emergency, the Equal Employment Opportunity Commission (EEOC) is reminding covered businesses that they must report EEO-1 Component 1 data for both 2019 and 2020 by July 19, 2021. The portal for collection and submission will open on April 26, 2021.

Background. The duty to report applies to businesses with 100 or more employees in their workforce (and federal contractors with 50 or more employees) and requires a demographic breakdown of the workforce by race and gender. Because many employers had wide fluctuations in their workforce during the pandemic, this may be a more-than-usually daunting task. It also remains to be seen how these setbacks and surges will affect the numbers. There is a longstanding presumption that certain statistical disparities suggest discrimination on the basis of race or sex. Some employers may be surprised by the results for these two very unusual years.