November 2019 Regulatory Update

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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood and Composite Wood Products MACT & RTR

Recent Developments. SLMA 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. As anticipated, it does not address the remanded MACT issues for lumber kilns or other equipment at wood product mills that will be addressed in a separate rulemaking at a later date. The comment period on the proposed RTR will be open for 45-days once it is published in the Federal Register, which is expected shortly.

SLMA and its industry partners were previously informed by EPA that the agency would have to bifurcate its ongoing MACT rulemaking and its RTR (Risk and Technology Review) as only the RTR is subject to a Court-ordered deadline of June 2020. EPA was concerned that it would not be able to complete either task by the deadline unless it cuts back on its efforts to work on the MACT.

Due to the significant progress that has been made with EPA on the MACT front over the last year, SLMA is extremely concerned that the bifurcation of these issues could result in the delay of the MACT rulemaking until after the 2020 elections. To date, SLMA and the industry coalition have been engaging with EPA to discuss work practice standards that are flexible and reasonable for major source lumber producers.

"Once In, Always In" Policy

Recent Developments. On October 2, 2019, EPA re-opened the public comment period on the June 26 Proposal discussed below. The new comment period is open until November 1, 2019.

On June 26, 2019, EPA finalized a proposed rule for the formal adoption of EPA's January 25, 2018 memoranda directed at the reversal of EPA's prior "once in, always in" policy. This policy prevented major hazardous air pollutant ("HAP") sources from *ever* being considered a minor/area source even if such source reduced their HAP emissions below major source levels. EPA's new position would allow a major source to reduce its emissions below the significant threshold and then opt out of the Title V permitting process (with respect to HAPs) and other programs directed at major sources only. EPA will accept comments on the Proposed Rule for 60 days after its publication in the Federal Register. We will continue to monitor this issue.

Climate Change Regulation

Recent Developments. None. On June 19, 2019, EPA issued a final rule that both repeals the Obama era Clean Power Plan and replaces it with the Affordable Clean Energy Rule (ACE). The former Clean Power Plan strictly limited potential greenhouse gas emissions from newly constructed *coal-fired* power plants. Interestingly, there are no current plans to build any new coal-fired power plants in the U.S. at this time.

Importantly, the final ACE does *not* list biomass as a compliance option for new coal-fired power plants. EPA explains that because the activities involved with the procurement of biomass are not under the control of the power plant operators, the facility cannot ensure that the biomass is "cleaner" than coal.

The ACE is expected to be challenged in court by numerous States and public interest groups.

Biogenic Carbon Emissions

Recent Developments. None. On February 14, 2019 the House passed the FY2019 Appropriations Bill. Among other things, the Bill emphasized the key role that forests can play in addressing the energy needs of the United States. The Bill directed the DOE, USDA and US EPA to ensure that Federal policy relating to forest bioenergy is consistent across all Federal departments and agencies and recognizes the full benefits of the use of forest biomass for energy, conservation, and responsible forest management. The Bill also directed the agencies to establish clear and simple policies for the use of forest biomass as an energy solution, including policies that reflect the carbon-neutrality of forest bioenergy, and recognize biomass as a renewable energy source.

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.

Revised Ozone Standard

Recent Developments. None. On August 23, 2019, the D.C. Circuit issued an opinion that generally upheld the Obama era 2015 Rule that lowered the national air quality standards for ozone. This decision is expected to have limited long-term impacts since, on August 1, 2018, EPA informed the Court that it will 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 US"

Recent Developments. The Final Rule to repeal the 2015 WOTUS Rule was published in the Federal Register on October 22, 2019.

On September 12, 2019, EPA announced that it has finalized a rule to replace the 2015 WOTUS Rule. This is the first step in the Trump Administration's 2-part plan to "repeal and replace" the 2015 Rule (proposed replacement rule discussed below). The Repeal Rule was first proposed 2 years ago and has been undergoing internal review. Once the Repeal Rule is formally finalized and published in the Federal Register, it is expected that a number of states and environmental groups will challenge the repeal.

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).

On April 15, 2019, SLMA and its industry partners, the Waters Advocacy Coalition, NAFO, and AF&PA submitted comments to EPA and the Corps on the agencies' February 14, 2019 proposed replacement of the 2015 WOTUS Rule. There is expected to be a massive number of comments submitted on the proposed scope of the 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 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 state 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.

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 greater need to apply for "jurisdictional determinations" from the agencies prior to taking action that could impact a WOTUS.

Industrial Stormwater General Permitting

Recent Developments. None. On February 20, 2019, the National Academies of Sciences released a report titled "*Improving the EPA Multi-Sector General Permit for Industrial Stormwater Discharges (2019)*". The Report's recommendations are intended to significantly ease the regulatory burdens presented by the current General Permit. The Multi-Sector General Permit authored by EPA is used as s guide to state agencies in the issuance of storm water permits specifically for sawmills and wood treating operations. EPA is reportedly studying the Report as the agency develops the next draft Multi-Sector General Permit to be proposed later in 2019.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

Recent Developments. At least 17 states and multiple environmental groups have filed legal challenges to the recently issued final rule discussed below. Additional lawsuits are also expected.

On August 12, 2019, the Department of the Interior finalized a series of rules, originally proposed last Fall, to significantly revise the process and factors to be used when considering ESA listing decisions. SLMA had previously joined the Forest Landowners Association in comments supporting the proposed revisions to the Act. 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 agencies' 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. It is expected that the rules will be published in the federal register within a few weeks.

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

Recent Developments. The Court has now scheduled the status conference for December 6, 2019; however, the scope of topics to be discussed at that time is unclear. As noted below, the parties are still waiting on a decision from the Court.

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 primarily to a disease know 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.

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 "no citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

Workplace Injuries and Illnesses Reporting

Recent Developments. None.

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

On May 11, 2016, OSHA issued the final rule requiring employers to electronically submit injury and illness data on an annual basis. The final rule originally required establishments with 250 or more employees to annually submit the OSHA 300 Log, OSHA Form 300A, and OSHA Form 301 incident reports, while establishments with 20 to 249 employees in certain industries (such as manufacturing) are only required to submit the OSHA Form 300A. On January 24, 2019, OSHA eliminated the requirement that large employers submit their OSHA 300 Logs and OSHA Form 301 incident reports. Covered employers are still required to submit their OSHA Form 300A on an annual basis. Beginning in 2019, covered employers must submit the prior calendar year's OSHA Form 300A data to OSHA by March 2.

The OSHA Injury Tracking Application and additional information regarding the electronic reporting requirement are available at: https://www.osha.gov/injuryreporting/.

Amputation

Recent Developments. At the recent National Safety Council Congress and Expo in San Diego, the Deputy Director of OSHA's Directorate of Enforcement Programs announced plans to release an updated version of the NEP on amputations, which is set to expire at the end of the year. We will continue to monitor OSHA activity on this issue.

Background. On August 13, 2015, OSHA updated its National Emphasis Program ("NEP") on amputations to include the following targeted industries: "Sawmills," "Wood Preservation," "Wood Window and Door

Manufacturing." "Cut Stock, Resawing Lumber, and Planing," "Other Millwork (including Flooring)," and "Wood Container and Pallet Manufacturing." If an employer in one of the targeted industries reports an amputation, it will be subject to an inspection under the Amputations NEP. The contents of the amputations NEP are available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=6228.

Combustible Dust Standard

Recent Developments. At the recent National Safety Council Congress and Expo, the Deputy Directory of OSHA's Directorate of Enforcement Programs also announced plans to revise the NEP on combustible dust for future release. (The combustible dust NEP went into effect in March 2008.) We will continue to monitor OSHA activity on this issue.

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 Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities ("NFPA 664") and the 2019 edition of the NFPA General Standards on the Fundamentals of Combustible Dust ("NFPA 652").

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

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Trump Issues New Executive Orders to Curb Back-Door Regulation

Recent Developments. President Trump signed two new executive orders on October 9, 2019 to reduce the government regulations without formal rule-making.

Background. At the signing ceremony, President Trump stated, "For many decades, federal agencies have been issuing thousands of pages of so-called guidance documents—a pernicious kind of regulation imposed by unaccountable bureaucrats in the form of commentary on how rules should be interpreted. All too often, guidance documents are a back door for regulators to effectively change the laws and vastly expand their scope and reach."

One order, called "Promoting the Rule of Law Through Improved Agency Guidance Documents" requires agencies to post all of their guidance documents on a searchable website with the understanding that anything not posted is considered rescinded. The other order, called "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" is an effort to prevent secret or unlawful interpretation of regulations and from unfair or unexpected penalties.

The two orders would not prevent agencies from prosecuting various enforcement actions, but they state that violations of the law should be based on statues and legally binding regulations. It is unlikely that opinion letters will be affected because they are specifically authorized by the Administrative Procedure Act.

Pressures from Both Sides Created—and Resolved—GM Strike

Recent Developments. The situation between General Motors (GM) and the United Auto Workers (UAW) seemed a "perfect storm" for a labor dispute.

Background. GM's profits have reached high levels in 2016 and 2017, before falling last year, with expectations for further downturns in U.S. auto sales. The investment community had that opinion that GM coddled the UAW, and thus avoided necessary cost cutting measures. The UAW, on the other hand, is experiencing a major membership decline from 1.5 million in the 1970s to around 400,000, partially from layoffs in Detroit and moving more work to Mexico. The UAW has been notoriously unsuccessful in attempting to organize foreign-owned car plants in the U.S., such as Nissan, Toyota, and Volkswagen. The UAW's newly-elected President was inexperienced in labor negotiations, and is himself the subject of a Justice Department investigation into corruption, along with many other UAW officials, some of which have already been convicted of various forms of embezzlement. The union president is under investigation for a "lavish lifestyle" that includes long stays at luxury lodgings, golf outings and state dinners with champagne and cigars. In the government raid of his suburban Detroit home, federal investigators seized golf clubs and $30,000 in cash. Even President Trump played a role by publicly criticizing GM for not building more in the U.S. It didn't help that the industry was shifting toward electric vehicles and self-driving cars. The union also resented concessions during the previous GM bankruptcy and wanted pay-backs.

GM was trying to require union members to pay some portion of the healthcare costs, which is currently at a ridiculously low 4%, well less than something like the 25%-30% industry average. The UAW was trying to reduce the current eight-year progression to reach the pay level of $30, as new hires start around $15 and go through a progression. The UAW also wanted to reduce their number of temporary workers and contractors.

The situation resulted in a strike of almost 50,000 workers, and occurred at a time when public approval of unions is the highest in 50 years. The strike is one of the biggest ones is many years. Over 30 factories in the U.S. were directly affected, resulting in problems for many suppliers as well.

The union seemed begging for a fight and increased its strike pay from $200 to $250 a week, and seemed desperate to show toughness to its membership. GM, in its effort to hold the line on costs, aggressively publicized its proposals to the entire workforce, a tactic designed to appeal directly to workers.

Finally, after over a month of striking, a tentative deal has been reached. GM has apparently promised to invest more monies in the U.S. factories and to keep some of them open that would otherwise have closed or been reduced. The agreement reportedly includes wage increases of 3% for two years of the contract and a 4% bonus payment the other two years, and further provides a path to full-time employment for temporary workers. The healthcare cost issue remains unchanged, and new hires will get improved pay and faster progression to the top rate. As usual, everyone lost in the strike. Some estimate GM's losses as much as $1.5 billion, and the union strikers lost wages that they will never regain.

Approval of Unions at Highest Level in Years

Recent Developments. According to a Gallop Poll on August 28 of this year, the approval rating for labor unions among the American public reached 64%.

Background. This 64% approval rating is up 16 points from the all-time low just ten years ago. The poll indicated that about 14% of Americans live in a union household. The survey found an 86% approval rating among those living in a union household, but only a 60% approval rating in non-union households.

President Campaign Staffs Plagued by Anti-Worker Accusations

Recent Developments. At least five Democratic presidential candidates have recognized labor unions as representatives of their campaign stags, including Bernie Sanders, Elizabeth Warren, Cory Booker, Julian Castro, and Eric Swalwell. Democratic candidates are catering to labor union votes, likely because of President Trump's strong support from union households in the last election. Surprisingly, results have not always gone the way the presidential candidates would have preferred.

Background. The Bernie Sanders campaign is facing unfair labor practice charges alleging illegal employee interrogation and retaliation. Apparently, negotiations between Sanders' campaign and then union representing staffers has not gone over well, although the NLRB has yet to determine whether the charges against Sanders' campaign have merit. Charges to the NLRB can be filed by "any person," and they do not have to come from someone directly affected by the alleged violations. A representative of the UFCW, the union representing Sanders' campaign staffers, declined to comment, as did the Sanders campaign officials.

More recent information indicated that the charge against Sanders' campaign was filed by a staffer alleging that the campaign "failed to notify us upon hire that we had a collective bargaining agreement and maintained that we were at-will." Other allegations include that the campaign broke the terms of its collective bargaining agreement by making staff work additional days and failing to provide days off.

Elizabeth Warren's campaign is also facing an unfair labor practice charge alleging its confidentiality agreement unlawfully prevents them from speaking out on workplace issues. The charge against Warren was filed by a non-employee who supports another presidential candidate and is targeting the campaign's reported use of unpaid fellowships as well as non-disparagement agreements. The Warren campaign reportedly requires its employees to not "make any statement that may impair or adversely affect the good will or reputation of the organization." Other reports indicate neither the Warren nor Sanders campaign are willing to pay the $15.00 per hour wages they had campaigned for.

A related development concerning the Bernie Sanders' campaign is that numerous reports indicate that union members are upset with Sanders for his idea of eliminating the current health coverage of union members in favor of a Medicare for all system. The unions oppose this idea on the grounds that negotiated health care benefits are a key perk of being in a union.

U.S. Department of Labor Issues Final Overtime Rule

Recent Developments. On September 24, 2019, the U.S. Department of Labor announced its long-anticipated Final Rule on exemptions and overtime under the Fair Labor Standards Act (FLSA). The new rule takes effect January 1, 2020.

Background. The Final Rule increases the salary thresholds necessary to exempt executive, administrative, or professional employees from the FLSA's minimum wage and overtime pay requirements from $455 to $684 per week (equivalent to $35,568 per year for a full-year worker). It also allows employers to count a portion of certain non-discretionary bonuses and commissions towards meeting that salary level: this will allow an employer to "catch up" an employee's earnings at year end so the employee qualifies for the exemption. The total annual compensation level for highly compensated employees (HCE) is increased from the currently-enforced level of $100,000 to $107,432 per year.

The variable pay component cannot exceed more than 10% of each employee's total pay. In addition, if an employee does not earn enough in non-discretionary bonuses and incentive payments (including commissions) in a given 52-week period to retain his or her exempt status, DOL permits a "catch-up" payment at the end of the 52-week period. This gives an employer one pay period to make up for a shortfall of up to 10% of the standard salary level for the preceding 52-week period. DOL did not make any revision to the separate duties test, which exempts workers from overtime if their primary duties involved supervisory functions or require advanced knowledge, provided they also earn more than the minimum salary. The new rule is expected to draw legal challenge from worker advocates, as an earlier Obama-era proposed regulation would have doubled the salary threshold to $47,500 and automatically updated it every three years.

Employers will need to weigh the cost of raising employee salaries above the new threshold against the cost of reclassifying them as non-exempt and paying overtime. Such changes will necessitate a communication strategy as employees tend to like salaried status, including the benefit levels that often come with salaried employees. The

changes could be explained as based on the new government rules. If employees are reclassified as hourly, employers will need to track work time and pay appropriate overtime premiums. Another potential solution is to keep employees on salary and pay one-half time overtime on a fixed pay for fluctuating hours arrangement. The latter arrangement should only be used with legal advice.

EEOC Gains Quorum and New General Counsel

Recent Developments. On August 1, 2019, the Senate approved Sharon Gustafson as the EEOC's new General Counsel and Charlotte Burroughs (D) for a second term as a member of the EEOC Commission. Gustafson had been awaiting Senate approval for almost 15 months, giving the Administration its first Senate-confirmed General Counsel. The authority of the EEOC General Counsel is quite significant as the Commission has delegated the authority to the General Counsel to determine which cases to litigate, and some consideration is being given to return that authority to the Commission rather than the General Counsel.

Background. Since the Commission now has a quorum to transact business, it will undoubtedly be addressing some of the controversial issues over which consideration has been postponed due to the lack of a quorum. Those issues include new policies on sexual harassment and the controversial issues associated with sexual orientation and gender identity. The Justice Department and the EEOC currently have conflicting opinions as to whether the discrimination laws protect LGBT workers, and a case dealing with that issue is now before the U.S. Supreme Court. Another controversial issue pending at the EEOC is the Obama-era initiative to require employers to submit pay equity data with their EEO-1 Reports. There is another nominee for the remaining open Commission position, and the Administration has nominated Keith Sonderling for this position, but as of yet there have been no Senate confirmation hearings.

Independent Contractor Legislation in CA Threatens Gig Workers

Recent Developments. The California legislature has passed a bill that has been signed by its Governor designed to reclassify many or most contract workers as employees.

Background. The bill goes into effect January 1, 2020, and applies what is known as the "ABC Test" to employment status. It requires companies that want to treat a worker as a contractor to prove that the worker is independent and free to perform the services provided without company control, that those services are outside the company's usual course of business, and that the contractor works independently in the same type of business as the contracted work. The bill, known as Assembly Bill 5, directly threatens the business model of the gig-economy companies like Uber, as would the legislation promoted by various Democratic presidential candidates in Congress. Further, the so-called "red" states across the country are looking at this bill and considering similar legislation.

The situation in California leaves many with the question as to what to do after the law goes into effect. Federal Express reacted to similar issues by abandoning any issues of independent contractor drivers in favor of smaller independent motor carriers, and contracting with corporate entities rather than individuals seems to promote the contractor classification. Although a company might also consider outsourcing employment to a staffing agency, issues still arise concerning potential joint employment liability.