October 2019 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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CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood and Composite Wood Products MACT

Recent Developments. On August 22, 2019, EPA issued the Proposal 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 with "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 ends October 21, 2019.

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 will 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 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. Members can view a summary of the rule in the members only section at https://www.slma.org/blog/.

"Once In, Always In" Policy

Recent Developments. None. 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 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. February 14, 2019, the house passed the FY19 Appropriations Bill. Among other things, the Bill emphasized the key role that forests can play in addressing the energy needs of the United States. The Bill directed the DOE, DOA and US EPA to ensure that Federal policy relating to forest bioenergy is consistent across all Federal departments and agencies and recognizes the full benefits of the use of forest biomass for energy, conservation, and responsible forest management. The Bill also directed the agencies to establish clear and

simple policies for the use of forest biomass as an energy solution, including policies that reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source.

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. 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 plan for the 2015 standards.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. On 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 challenged 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 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 federal jurisdiction over waters of the U.S.

EPA states that it hopes that the Proposal would allow for a jurisdictional test that is clearer and easier to

understand for the regulated community. The proposed rule establishes **six** categories of waters that would be considered "waters of the United States:"

- **Traditional navigable waters** (TNWs): Large rivers and lakes, tidal waters, and the territorial seas used in interstate or foreign commerce.
- **Tributaries**: Rivers and streams that flow to traditional navigable waters. These naturally occurring surface water channels must flow more often than just when it rains—that is, tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.
- **Certain ditches**: "Artificial channels used to convey water" would be jurisdictional where they are traditional navigable waters, such as the Erie Canal, or subject to the ebb and flow of the tide. Ditches may also be jurisdictional where they satisfy conditions of the tributary definition as proposed and either 1) were constructed in a tributary or 2) were built in adjacent wetlands.
- **Certain lakes and ponds**: Lakes and ponds would be jurisdictional where they are traditional navigable waters, or where they contribute perennial or intermittent flow to a traditional navigable water either directly or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream. Lakes and ponds would also be jurisdictional where they are flooded by a "water of the United States" in a typical year, such as many oxbow lakes.
- **Impoundments**: Impoundments of "waters of the United States" would be jurisdictional.
- **Adjacent wetlands**: Under the proposal, wetlands that physically touch other jurisdictional waters would be "adjacent wetlands." Wetlands with a surface water connection in a *typical year* that results from 1) inundation from a "water of the United States" to the wetland or 2) perennial or intermittent flow between the wetland and a "water of the United States" would also be "adjacent." Wetlands that are near a jurisdictional water but don't physically touch that water because they are separated, for example by a berm, levee, or upland, would be adjacent only where they have a surface water connection described in the previous bullet through or over the barrier, including wetlands flooded by jurisdictional waters in a typical year.

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

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

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

- On June 8, 2018, the U.S. District Court for the Southern District of Georgia issued a Stay of the 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 increased harassment and litigation from public interest groups. It will also lead to a greater need to apply for "jurisdictional determinations" from the agencies prior to taking action that could impact a WOTUS.

ENDANGERED SPECIES ACT

Prepared by Kilpatrick Townsend.

ESA Regulatory Reform

Recent Developments. 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.

ESA Review of Tri-Colored Bat

Recent Developments. None. The U.S. Fish and Wildlife Service (USFWS) has initiated a 12-month review to determine whether to list the Tricolored Bat under the Endangered Species Act (ESA). The underlying rationale for the review is the decline of the species population due to White Nose Syndrome (WNS). If the USFWS determines the bat is endangered, then habitat conservation measures similar to those proposed for the Northern Long-Eared bat would be likely. We will monitor the development of this potential rulemaking as it moves forward.

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

Recent Developments. The Court is in the process of rescheduling the status conference that had been set for October 4, 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 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.

Workplace Injuries and Illnesses Recordkeeping

Recent Developments. None.

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

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

Workplace Injuries and Illnesses Reporting

Recent Developments. 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 electronic reporting rule also expressly prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. To that end, the rule requires employers to inform employees of their right to report work-related injuries or illnesses without retaliation. This notice requirement may be satisfied by posting the *OSHA Job Safety and Health – It's The Law* worker rights poster from April 2015 or later). In addition, the employer must ensure that its procedure for reporting work-related injuries and illnesses is reasonable and does not deter or discourage employees from reporting.

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 Director 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 are likely to cause death or serious harm," and housekeeping obligations set out in other OSHA standards, such as the recent Final Rule on walking-working surfaces and fall protection systems. Employers should also look to guidance from industry consensus standards, such as the 2017 edition of the NFPA Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities ("NFPA 664") and the 2019 edition of the NFPA General Standard on the Fundamentals of Combustible Dust ("NFPA 652").

Under NFPA 652, all facilities with combustible dust hazards must 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.

OSHA to Investigate Retaliation Complaints Under New Taxpayer First Act

Recent Developments. OSHA has been granted authority to handle retaliation complaints under the New Taxpayer First Act ("TFA"), which was signed into law on July 1, 2019. Under the TFA, retaliation is prohibited against employees who provide information regarding 1) the underpayment of tax, violations of internal revenue laws, or violations of federal law relating to tax fraud; 2) to the IRS, any other federal entity listed in the statute, a supervisor, or any other person working for the employer who has the authority to investigate, discover or terminate misconduct. The TFA also prohibits retaliation against employees who testify, assist, or participate in any administrative or judicial action taken by the IRS relating to the alleged underpayment of tax, violation of internal revenue or violation of federal law relating to tax fraud.

OSHA enforces the whistleblower provisions of more than 20 different federal statutes, including the OSH Act, Affordable Care Act, and Sarbanes-Oxley Act.

Fall Protection Tops List of Most-Cited OSHA Violations

Recent Developments. On October 10, 2019, OSHA released the list of top ten most common OSHA violations. Lack of fall protection remained the most commonly cited OSHA violation, followed by hazard communication and scaffolding. The complete list, number of violations, and standard citations are listed below:

1. Fall protection — general requirements, 6,010 (29 C.F.R. 1926.501).
2. Hazard communication, 3,671 (29 C.F.R. 1910.1200).
3. Scaffolding, 2,813 (29 C.F.R. 1926.451).
4. Lockout/tagout, 2,606 (29 C.F.R. 1910.147).
5. Respiratory protection, 2,450 (29 C.F.R. 1910.134).
6. Ladders, 2,345 (29 C.F.R. 1926.1053).
7. Powered industrial trucks, 2,093 (29 C.F.R. 1910.178).
8. Fall protection — training requirements, 1,773 (29 C.F.R. 1926.503).
9. Machine guarding, 1,743 (29 C.F.R. 1910.212).
10. Eye and face protection, 1,411 (29 C.F.R. 1926.102).

Relatedly on workplace inspections, OSHA reported that it is on track to match the number of inspections conducted in prior years. As of July 2019, OSHA has conducted 24, 256 workplace inspections. In prior years, the number of OSHA workplace inspections averaged approximately 32,000 inspections annually.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Misclassifying Workers as Independent Contractors

Recent Developments. The National Labor Relations Board (NLRB) ruled on August 29, 2019 that employers do not violate the National Labor Relations Act (NLRA) solely by misclassifying employees as independent contractors.

Background. The Board majority held that an employer's communication to its workers of its opinion that they are independent contractors does not, standing alone, violate the NLRA even if that opinion turns out to be mistaken. According to the decision, such communication does not inherently threaten those employees with termination or other adverse action if they engage in activities protected by the NLRA, nor does it communicate that it would be futile for them to engage in such activities. *Velox Express, Inc.*, 368 NLRB No. 61.

Editor's Note: This NLRB ruling is critically important, as otherwise the contractor status of many entities across the country could have been put in doubt by the simple filing of a charge with the NLRB. Instead, the NLRB decided that future legal battles about misclassification are to be decided in this context in other tribunals.

It should be noted that the outcome may have been different had the respondent in the case indicated to its workforce that union organizing or other protected concerted activities would be futile, or threatened purported independent contractors with reprisal for taking such actions. The ruling left room for the finding of

a violation in such circumstances, as all the Board did in the Velox case was to rule that an employer's communication of its position that its workers are independent contractors does not threaten reprisal or futility.

Board Gives Employers Broad Rights re Mandatory Arbitration Agmts.

Recent Developments. This newsletter in the past has published many articles about the Epic Systems Supreme Court ruling, which holds that employers may enter into individual arbitration agreements with employees requiring almost all disputes to go to individualized arbitration and waving class and collective actions.

Background. In a ruling on August 14, 2019, the NLRB broadened and clarified employer rights in this regard. *Cordua Restaurants, Inc*., 368 NLRB No. 43.

The NLRB addressed several important questions involving mandatory arbitration agreements following the Supreme Court's *Epic System* decision. Specifically, the Board held:

- Employers are not prohibited under the NLRA from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
- Employers are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees outing in to a collective action under the Fair Labor Standards Act or state wage-and -hour laws.
- Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

What this means for employers:

- Employers are allowed to condition employment on signing mandatory arbitration contracts.
- Employers can warn workers that they will be fired if they fail or refuse to sign mandatory arbitration agreements.
- Employers can require employees to sign mandatory arbitration pacts in response to workers opting into FLSA collective actions or class actions brought under state wage-and-hour laws. In those agreements, employees must agree that they will not opt into an existing collective action. This is a powerful weapon for an employer to wield in response to the filing of a collective action.

According to a 2018 study by the Economic Policy Institute, more than half of nonunion, private sector employers have mandatory arbitration procedures. However, these agreements are not "one size fits all." It is advisable to contact qualified counsel to craft an agreement that meets the needs of your particular business and workforce.

Use of "Testers" Plagues Employers in Lawsuits

Recent Developments. This writer has experienced the "tester" issue in various ways readers will find quite interesting. First, a "tester" is generally considered someone who seeks access or employment in a way designed solely to generate a legal case.

Background. A number of years ago, this writer represented a trucking employer at which an immigrant driver participated in a telephone interview. The driver spoke with a heavy accent and "bated" the employer representative into questions about his accent and critical comments about his inability to communicate properly. The driver applicant immediately filed a federal court lawsuit against the employer. The employer did not want to bear the expenses of the litigation, and instructed this writer to attempt to immediately settle the case.

After talking with the plaintiff driver over the telephone, who did not have counsel, it was obvious that the person was totally unreliable. The circumstances were such that a face-to-face meeting with the driver was necessary to get the settlement release signed and then provide the settlement check to the driver.

After getting the settlement agreement signed and paying the plaintiff driver applicant, the driver said that he had done this identical thing about 30 different times. Actually, he made a living out of "setting up" employers in this manner, pocketing the proceeds, without even the need of an attorney to share the profit.

Fast forward a number of years, and this firm has had recent similar experiences involving a "tester" under the Americans with Disabilities Act (ADA). In this situation, one of the firm's clients was sued by a woman who claimed that she had visited the client's shopping center and the parking, entrance, bathroom and other features of the shopping center did not comply with the public accommodation provisions of the ADA. Wimberly & Lawson quickly found out that this female plaintiff was a named plaintiff in more than 100 lawsuits over the last couple of years. In fact, published reports in the Atlanta newspapers indicated that the plaintiff's attorney filed several hundreds of lawsuits under the ADA, apparently sending around testers to seek violations. The website of the attorney suggested that he pays his clients finders' fees to root out alleged ADA violations.

Some consider such tactics a fair fight for civil rights, while others contend that the tester tactics are an unethical attempt to get quick settlements from small employers who found it cheaper to pay plaintiffs' attorneys than to fight. One such defendant who settled subsequently filed a class-action lawsuit targeting the plaintiffs' attorney, a business associate, and several of his clients as running an organized criminal campaign to squeeze largely minority-owned businesses with no real motive to make them more accessible to the disabled. In at least one recent development in Florida, a federal judge sanctioned an attorney who had filed more than 650 ADA cases across the state. The judge ordered the attorney to pay back settlements and pay other penalties.

Employers should remember that the ADA public accommodation provisions applies to employers too, and not just other commercial establishments. In fact, a number of recent lawsuits have been filed concerning inaccessible procedures for job applicants with disabilities.

For readers who consider such development new, please remember that the use of “testers” has occurred for many years in the construction industry, where they are often referred to as “plants.” Such plants are typically union organizers or their agents and they seek employment with the goal of building NLRB charges or other litigations against the construction industry employer, sometimes as an effort to run the employer out of business. This writer experienced one of those situations recently in the construction industry, whereby the union plants engaged in a work stoppage and baited the employer into firing them. The NLRB found that the firings were illegal and ordered those employees reinstated with back pay. Ultimately, a majority of the "strikers" returned to work, only to call a second strike. As part of the NLRB compliance proceedings, the Board found that none of the strikers were due any back pay, apparently because they were employees of the union.

The bottom line is that there are persons and entities that have a practice of "setting employers up" for various types of legal claims.

EE0-1 Pay Data Deadline Looms

Recent Developments. In case you haven’t heard, September 30, 2019 is the deadline for employers with more than 100 employees to file a new electronic form with the Equal Employment Opportunity Commission (EEOC) disclosing detailed pay data for 2017 and 2018.

Background. EEOC has set up an electronic portal for these submissions, which must include detailed compensation data for 10 job categories, identifying employees by the same racial, ethnic and sex groupings used when submitting demographic data in earlier EEO-1 forms.

This comes amid ongoing litigation between an advocacy group and the EEOC, pursuant to an order from the D.C. District Court. (The case has been appealed, but not stayed, which means that employers are expected to comply even as the appeal is pending.) The push to collect pay data by demographic groupings, called “Component 2” of the EEO-1 form, originated in the Obama Administration: the Trump Administration put the

Obama-era regulations on hold, but they were revived in a lawsuit, National Women's Law Center, et al., v. *Office of Management and Budget, et al*. The Court has ordered the EEOC to ensure Component 2 compliance at levels at least as good as those for the regular EEO-1 submissions by the September 30 deadline. Interestingly, EEO-1 compliance levels run at about two-thirds of covered employers, and EEOC has always held the door open for filings for at least 11 months after the due date. As of September 5, EEOC reported that only 13.4% of covered employers had submitted the Component 2 information.

Employers are legitimately concerned about the confidentiality of sensitive compensation data and worry that their information will be harvested by private attorneys seeking to file pay discrimination lawsuits. We recommend that employers filing submissions use the "comment" box on the form to note that (1) the information provided is considered by the employer to be private, privileged and confidential, and is submitted subject to the EEOC's assurance that it will not be disclosed; (2) the employer made its best efforts to gather information as required based upon dates set retroactively, and therefore the information provided is qualified due to various data-gathering issues; and (3) employees in the various pay "bands" do not perform equal work.

The required form is 15 pages long and must be submitted electronically. It's not clear whether extensions will be granted, but some covered employers already have asked for hardship waivers.

And it's not clear what the penalty for noncompliance would be: there's only one reported case of an employer being fined for failing to timely submit the regular EEO-1 form, and that fine was just $100.

EEOC has prepared detailed guidance on how to complete the form, which may be viewed at https://eeoccomp2.norc.org/info. The Commission also is offering answers to employers' frequently asked questions at: https://eeoccomp2.norc.org/faq. A word of warning: after the electronic report is submitted, the employer will not be able to access it. If reports are due in future years, the employer will have to start from scratch. To avoid having to re-invent the wheel, a prudent employer will take care to create and retain backup copies of all documentation submitted.

If the National Women's Law Center case is reversed by the D.C. Circuit, the Component 2 requirement will go away, and employers who fail to file on time presumably will be excused. But as of this writing, the court has ordered employers to file by September 30. Further, on September 11, 2019, the EEOC announced that the filing of Component 2 may be a one-time event, as the EEOC states the burden to collect the data is higher than previously estimated and deserves additional examination before the Agency seeks White House approval for more pay reporting. The previous pay collection requirement is set to expire after September 30, so there is additional temptation to employers to file late or not at all. Stay tuned!

Company Raided in Mississippi Immigration Matter Fights Back

Recent Developments. Most readers are familiar with the fact that on August 7 of this year, ICE personnel arrested around 680 persons during raids of seven food processing plants in Mississippi.

Background. On September 3, 2019, one of the plants raided, Koch Foods of Mississippi, LLC, filed a Motion to Suppress and Return of Property taken during the raids, contending that the raid was not legal, and that the "exclusionary rule" should bar the government's use of the information illegally seized during the raid. The exclusionary rule applies as an application of the Fourth Amendment to the U.S. Constitution, which applies when government authorities exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights in searches and seizures of a person's or entity's property.

The company's memorandum supporting its Motion basically contends that the affidavit supporting the search warrant did not contain any evidence that the company knowingly employed persons lacking sufficient work authorization. The company cites law to the effect that when a challenged search is conducted pursuant to a warrant, the court must examine whether there is probable cause supporting the warrant, and whether the good-faith exception to the exclusionary rule applies even in the absence of probable cause. The company contends under this analysis that the search warrant executed at the Morton plant was not obtained in good faith, and it

was not objectively reasonable. Instead, the affidavits leading to the warrant are founded on the presumption that certain deported persons had previously worked at the Morton processing plant, so that it should be assumed that the company must have known that they were hiring unauthorized workers. The company's actions are probably in anticipation of possible penalties that ICE may charge after completing its audit of the facilities, and also an effort to restore the company's reputation in the community.