August 2020 Regulatory Update

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COVID-19 TEMPORARY EPA ENFORCEMENT POLICY

Prepared by Kilpatrick Townsend.

Recent Developments. EPA has announced its intent to terminate the temporary Enforcement Policy it issued March 26, 2020 in response to the COVID pandemic. The Policy will terminate on August 31, 2020.

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

- The policy is temporary but applies to actions/omissions that occur while it is in effect, even after the policy is terminated. Its duration will be reassessed on a regular basis, and EPA will provide at least seven days' notice of its termination.
- Generally, if compliance is "not reasonably practicable," facilities should:
  - Minimize the effects and duration of noncompliance, and
  - Identify and document the nature and dates of noncompliance, how COVID-10 caused the noncompliance, and the steps taken to return to compliance.
- EPA does not expect to seek penalties in situations where they agree that "COVID-19 was the cause of noncompliance and the entity provides the supporting documentation to the EPA upon request.
- Once the policy is no longer in effect, EPA does not plan to ask facilities to "catch-up" missed monitoring or reporting if it pertains to a requirement with intervals of less than three months. For semi-annual or annual obligations, EPA expects entities to take reasonable measures to resume compliance activities as soon as possible and note that the reason for delay when submitting late information.
- The policy is not binding to States and their state-run environmental compliance programs.
- The policy also does not apply to criminal violations, Superfund and RCRA corrective actions, accidental releases, and imports.

CLEAN AIR ACT

Prepared by Kilpatrick Townsend.

Plywood & Composite Wood Products MACT

Recent Developments. On June 8, 2020, EPA signed a Final Rule to update the PCWP Risk and Technology Review (RTR). Consistent with the previously issued proposed rule, the Final Rule concludes that control technologies for Hazardous Air Pollutants (HAP) emissions for the PCWP industry have not changed since the 2004 MACT was issued and that public health risks are acceptable with "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.

Boiler MACT Rulemaking/Litigation

Recent Developments. On July 9, 2020, EPA issued the long-awaited Proposal to address the prior remand of specific issues within the Boiler MACT. Our review of the Proposal is ongoing, and SLMA expects to submit comments on the Proposal with its industry partners, but overall, the Proposal appears to be very fair and reasonable to the wood products industry. Among other things, the Proposal includes several important items that were advocated by the industry, including:

- A three-year period to achieve compliance once the rules are finalized (expected to happen near the end of the year).
- Allows monitoring of Carbon Monoxide as a surrogate for several organic HAPs .
- For sources within the biomass Hybrid Suspension Grate subcategory, the only change to the prior MACT was a slight reduction in the allowed mercury limit, but it is expected that this will not pose a compliance problem for the majority of such sources.
- Please note that the Boiler MACT is and will only be applicable to "major sources" that emit more than 25 tons per year of Hazardous Air Pollutants (HAPs).

Revised Ozone Standard

Recent Developments. On July 13, 2020, EPA issued a Proposed Rule to retain the 2015 primary and secondary Ozone NAAQS going forward at the current 70 ppb standard. EPA plans to hold two virtual public hearings on the Proposal this summer and will then solicit comments for a period of 30 days after the second hearing. SLMA will continue to work with its industry partners on the preparation and submittal of comments in support of the Proposal.

Background. 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.

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

Recent Developments. On June 4, 2020, EPA issued a Notice of Proposed Rulemaking for "increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process."

EPA is requesting comment on the potential to implement a more unified approach to considering costs and benefits under various provisions of 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 that regulatory agencies such as EPA often have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and thus to comply with the longstanding Presidential Directives to do more good than harm.

SLMA will work with its industry partners to prepare and submit comments on the Proposed Rule. The comments will seek to not only address the types and quality of economic data that should be considered, but also whether and under what circumstances EPA could and should determine that a future significant Clean Air Act regulation should be promulgated only when the benefits of the intended action justify the costs.

We understand that EPA Administrator Wheeler has also recently stated that the Agency plans to follow with similar cost-benefit rules for the water, land, and chemicals programs over the next three years.

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

Biogenic Carbon Emissions

Recent Developments. EPA has reportedly sent the Biomass rule back to OMB for review in part to evaluate the impact of the finalization of the ACE discussed above., after discussions between EPA and industry indicated that EPA believed it needed to revise and the draft rule that is intended to classify biomass as carbon neutral when burned for energy. EPA appeared to be concerned about the potential impact of the currently worded rule on other recent EPA actions. EPA reportedly remains committed to the carbon neutrality concept.

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

Proposed SSM SIP Call Rule

Recent Developments. None. Although the litigation continues to be stayed indefinitely (see below), EPA has recently taken actions in Texas and North Carolina that could indicate a willingness to abandon the previously issued 2015 SSM Rule.

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. This move may indicate that EPA is planning to reconsider the Rule internally.

CLEAN WATER ACT

Prepared by Kilpatrick Townsend.

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

Recent Developments. A federal court in Colorado has issued a Stay of the WOTUS Rule; however, the Stay only applies inside the state. A federal court in California refused to issue a nationwide Stay despite the request from multiple states and organizations.

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 will take effect 60 days from publication. The Final Rule seeks to clarify and simplify the definition of WOTUS and was issued in response to the Obama era WOTUS Rule that was finalized in 2015 and broadly expanded the reach of the federal government under the Act. The 2015 Rule was repealed in late 2019, and the current action seeks to "replace" the prior rule.

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

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

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

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

Prepared by Kilpatrick Townsend.

NEPA Regulatory Reform

Recent Developments. 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 , 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 (NEPA reviews often take up to 4 years), and
- Agencies may now develop categories of activities that require no environmental assessment at all.

Once the Final Rule is published in the Federal Register, numerous states and environmental organizations are expected to file legal challenges to the rule.

Background. On January 10, 2020, the Trump Administration announced additional proposed revisions to the Act. The proposed revisions, which are open for public comment for 60 days, take aim at several regulatory reform items, but the most significant changes would address the role of climate change within the ESA review process. The proposed rules would substantially limit the consideration of the impact of a project on climate change by making the following changes to existing rules:

- The Proposed Rule would simplify the definition of "effects" which must be evaluated by striking specific references to direct, indirect, and cumulative effects. Under the new definition, effects must be reasonably foreseeable and have a reasonable causal agency action to require evaluation. The Proposed Rule clarifies that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain.
- The Proposed Rule changes current policy by stating that analysis of cumulative impacts is not required under NEPA. As such, only the reasonably foreseeable effects of the actual project in question should be considered by the NEP analysis.

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

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

Recent Developments. None. In early May, the industry coalition that has been an intervenor in the case decided not to pursue an appeal of the decision discussed below. The federal government has also decided to drop its appeal of the ruling.

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

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

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

Background. On January 14, 2016, the USFWS published a Final Rule under Section 4(d) of the Act. The Final Rule authorizes certain incidental/unintentional "takes" (i.e., harm or death) including those 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.

Supplemental Guidance for Re-Opening Businesses

Recent Developments. On June 18, 2020, OSHA issued guidance to assist employers reopening non-essential businesses during the evolving pandemic. (This guidance supplements and updates OSHA's prior Guidance on Preparing Workplaces for COVID-19.) OSHA advises employers to continually monitor federal, state, and local government authorities for updated information regarding community transmission and mitigation guidelines. During all phases of re-opening, employers should implement policies and procedures to promote basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training geared toward the particular phase of re-opening. Re-opening plans should also address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community.

OSHA advises that re-opening plans should address the following key elements:

- Hazard Assessment (identify when, where, how and to what sources workers are likely to be exposed to COVID-19 in the course of their job duties)
- Hygiene (handwashing, disinfection)
- Social Distancing (maximizing, to the extent feasible, six feet of distance between workers, customers, and/or visitors)
- Identification and Isolation of Sick Workers (self-monitoring for symptoms, excluding workers who exhibit COVID symptoms)
- Employee Return to Work After Illness or Exposure (follow CDC guidance for discontinuing self-isolation/self-quarantine as appropriate)
- Control (engineering and administrative controls, safe work practices, and PPE based on employer's hazard assessment)
- Workplace flexibilities (allowing telework where appropriate, leave policies)
- Employee Training (training on COVID symptoms, where and how workers may be exposed to COVID in the workplace, how to prevent workplace spread)
- Anti-Retaliation (ensuring that no adverse or retaliatory action is taken against an employee who adheres to OSHA guidelines or raises safety/health concerns).

Additional information regarding the OSHA Supplemental Guidance is available at: https://www.osha.gov/news/newsreleases/national/06182020. OSHA also recently published a webpage with Frequently Asked Questions regarding the COVID-19 pandemic at: https://www.osha.gov/SLTC/covid-19/covid-19-faq.html.

Workplace Injuries & 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).

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 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 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.

Workplace Injuries & Illness 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/.

Combustible Dust Standard

Recent Developments. None.

Background. OSHA has been in the process of developing a comprehensive general industry standard to address combustible dust hazards since 2009. In 2017, the proposed standard was removed from the federal regulatory agenda. While a dedicated combustible dust standard is no longer a priority for OSHA at this time, the agency retains authority to cite employers for combustible dust hazards under the "general duty" to provide a workplace "free from recognized hazards that are causing or likely to cause death or serious harm," and housekeeping obligations set out in other OSHA standards, such as the recent Final Rule on walking-working surfaces and fall protection systems. Employers should also look to guidance from industry consensus standards, such as the 2017 edition of the NFPA Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities ("NFPA 664") and the 2019 edition of the NFPA General Standard on the Fundamentals of Combustible Dust ("NFPA 652").

Under NFPA 652, all facilities with combustible dust hazards must have a Dust Hazard Analysis ("DHA") completed by a professional safety consultant by September 7, 2020. The DHA must be led by a qualified person in-house or a third-party safety consultant. While the qualified person leading the DHA is not required to have specific safety certifications, the qualified person must be familiar with conducting a DHA and with the hazards of combustible dust. A DHA is typically conducted by a team whose collective background and expertise may include: (1) familiarity with the process; (2) operations and maintenance; (3) process equipment; (4) safety systems; (5) the history of the operation; (6) the properties of the material; and (7) emergency procedures. For some processes, a team of two may suffice, while more complex processes may require a larger team. The individuals involved in the DHA can include facility operators, engineers, owners, equipment manufacturers, and/or consultants.

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.

Recent OSHA Citations in the Lumber Manufacturing Industry

Recent Developments. On July 9, 2020, an Alabama lumber and flooring manufacturer was issued an OSHA citation after a worker was fatally struck by a piece of wood while attempting to clear a jammed machine. OSHA cited the employer for failing to: 1) lock out equipment prior to beginning maintenance; 2) ensure machines were properly guarded; and 3) train employees on lockout/tagout procedures. OSHA noted that the employer developed an alternative energy control procedure for clearing equipment jams after an employee suffered an amputation in 2018, but the employer allegedly failed to implement the new procedure.

OSHA assessed $218,192 in penalties. The bulk of the penalties ($207,802) are attributed to "willful" OSHA violation, likely based on the employer's failure to implement the new lockout procedure after the 2018 amputation.

On July 10, 2020, a Georgia wood products manufacturers was issued an OSHA citation after a worker suffered a fatal injury when their clothing became caught on the shaft of a conveyer. The inspection was conducted pursuant to the National Emphasis Program on Amputations and Regional Emphasis Program for Powered Industrial Trucks. OSHA cited the employer under the lockout/tagout and the powered industrial truck standards for: 1) failing to ensure that energy control procedures contained specific steps to limit the release of hazardous energy; 2) failing to provide lockout/tagout devices; 3) failing to train employees to recognize sources of hazardous energy; 4) allowing employees to operate powered industrial trucks without proper training; 5) failing to conduct annual lockout/tagout inspections; 6) failing to provide proper machine guarding; and 7) failing to reduce compressed air to a safe level before allowing workers to use it for cleaning. OSHA assessed $55,326 in penalties in connection with the fatality.

Background. The OSHA Lockout/Tagout (29 CFR 1910.147), Powered Industrial Trucks (29 CFR 1910.178,), and Machine Guarding (29 CFR 1910.212) are consistently among the ten most cited OSHA standards. OSHA routinely cites employers for failure to comply with employee training and inspection requirements under these standards, and the burden is on the employer to prove that the required training and inspections were completed. Training records can also be helpful in establishing an employee misconduct defense, where appropriate. Therefore, employers should maintain complete and accurate written records of employee training and inspections, and we recommend periodic audits of training and inspection records to confirm that OSHA training and inspection requirements are being met.

EMPLOYMENT LAW

Prepared by Wimberly & Lawson, P.C.

Court Rejects Efforts to Discontinue DACA

Recent Developments. The issue of undocumented immigrants brought into this country as children has long been a controversial one. Although technically unauthorized, President Obama during this term implemented the Deferred Action for Childhood Arrivals Program (DACA), which in essence indicated that the government would not enforce laws against person brought into this country illegally as children.

Background. The Trump Administration rescinded the non-enforcement policy of the Obama Administration, and the subsequent litigation went all the way to the U.S. Supreme Court. *Department of Homeland Security v. Regents of the University of California,* 18-587. In a June opinion in which Chief Justice John Roberts joined the Court's liberal justices in a 5-4 majority, the high court ruled that the Department of Homeland Security failed to consider conspicuous issues, including the hardship on DACA recipients, and thus there were doubts about whether the agency appreciated the scope of its discretion or exercise that discretion in a reasonable manner. The recession of DACA was found to be "arbitrary and capricious," violating the Administration's Procedure Act that governs administrative agencies.

Many found irony in the ruling that did not challenge the propriety of the change in policy, but only the procedure the agency followed in doing so. The Court in essence found that correct reasoning had to be applied in beginning to enforce a law that was passed by Congress, but that a previous administration had decided not to enforce. Dissenting Justice Samuel Alito wrote that the Constitutional system is not supposed to work this way, and in a dissenting opinion joined by Alito and Gorsuch, Justice Thomas called the DACA program "substantially unlawful." Justice Thomas raised another interesting point, being that the ruling might create "perverse incentives" for outgoing administrations. That is, an administration could rely on the DACA decision to "bind their successors by unlawfully adopting significant legal changes through Executive Branch Agency Memoranda."

In any event, the ruling does not preclude the President from trying again to cancel the program with a better explanation, but it is unlikely that any changes will be made before the November election. Meanwhile, the estimated 700,000 DACA children will be allowed to live and work in the U.S. However, DACA is only available to immigrants who had been living in the U.S. since 2007, along with other requirements. The so-called "Dreamers" thus may continue to stay in the U.S., although at least ten variations on the "Dream Act" have been proposed but failed in Congress.

Editor's Note: The ability of states and/or interested group to challenge administrative opinions seems to be at an all-time high. Past administrations have won a majority of court cases challenging federal administrative rulings, but the current administration is losing a majority of such cases. Courts are increasingly requiring detailed and complete records to justify administrative action. Further, challengers to administrative actions are filing their cases in courts before judges anticipated to be more favorable to their positions, and then seeking national injunctions against the new rules.

High Court Expands Religious Rights

Recent Developments. A trilogy of U.S. Supreme Court rulings have expanded religious rights, with one of the rulings pertaining to most private employers. In *Little Sisters of the Poor v. Pennsylvania,* the Court ruled that the Trump Administration had the right to exempt employers that raised religious or moral objections to the Affordable Care Act (ACA) prior requirements that health-insurance plans cover contraceptives.

Background. Justice Thomas wrote for the Court that the ACA gives administrators "broad exception" to carve out religious and moral exemptions, under a law that expressly deals with requiring cost-free "preventive care and screenings" and leaving it to the federal agency to determine what is included. Justice Thomas wrote that: "It was Congress, not the Department, that declined to expressly require that contraceptive coverage in the ACA itself." The Court did not address whether the U.S. Religious Freedom Restoration Act requires the type of sweeping exemption the Administration put in place. The Trump Administration had provided a blanket exemption from the coverage requirements for any employer, including for-profit and publicly traded corporations, that asserted religious or moral objections. The ruling was 7-2, with only Justice Ginsberg and Sotomayor dissenting, arguing that the majority force women to pay the cost of their employer's religious beliefs.

In another ruling affecting religious schools, the Court extended earlier Supreme Court rulings that shielded religious organizations from employment-discrimination claims about ministers, in a ruling that religious schools were immune from age and disability discrimination claims filed by lay teachers. *Our Lady of Guadalupe School v. Morrissey-Beru* and *St. James School v. Biel.* In a third case during the prior week, the Court ruled in a 5-4 decision that a state could be required to give religious schools the same benefit it gives other private schools in a tax credit program.

Many interpret the new rulings as adding to the suggestion that the Supreme Court's conservative majority is on occasion joined in by more liberal colleagues towards a framework that grants organizations more freedom in public policies they opposed on religious grounds.

Walkouts and Other Pandemic and Racial Issues

Recent Developments. Off-duty issues and activities, and their impact at the workplace, seem to be growing today. Social media protests have increased since the Black Lives Matter movement has intensified, and pandemic issues are not abating. Often, both as practical and legal matter, these issues cannot be kept out of the workplace.

Background. For several years now, employers have struggled in dealing with social media protests and whether company rules can limit speech. There are further questions of whether it is a good or bad idea to attempt to limit such speech. The answers are quite complicated.

The policies of the National Labor Relations Board (NLRB) have dictated for decades that much speech and activity is "protected concerted activity," even if it does not relate to union activity. Classic examples would be group activity in support of safety conditions such as the pandemic, or protests against any form of discrimination in the workplace. While the doctrine of "employment-at-will" may exist, it is overridden by exceptions under various discrimination laws as well as laws pertaining to protected concerted activity. Protests dealing with immigration issues also may overlap and on occasion be considered protected concerted activity.

Many employers themselves now feel compelled to speak out on public issues, including discrimination issues, immigration, and the like. A further complication is addressing what is protected versus what is considered offensive, racist or sexist. A recent case, for example, involved a Google employee who spoke out against affirmative action efforts towards females, writings that arguably contained both protected and unprotected speech. Imagine the confusion if an employer is confronted with several employees wearing "White Lives Matter," and/or "Black Lives Matter" t-shirts. The goal of employers in providing a respectful and harassment-free workplace is increasingly difficult. It would appear that the same guidelines in theory apply to online comments as to saying something in person.

These complicated issues over social concerns and protected concerted activity overlap with the controversial issue of relating off-duty conduct by employees. Such a rule sometimes offends employee attitudes towards their rights, and also many states have protecting lawful off-duty activities for employees. These issues become further complicated when employers attempt to avoid the spread of COVID-19 by advising employees to avoid close contact with people outside their workplace and to stay away from mass gatherings to maintain proper social distancing. This gets even more complex when a person may be infected with the virus and questions are asked about off-duty activities and contact with other persons. (This does not suggest being silent on these matters, just to be cautious).

Activists and even labor organizations are making leadership efforts to support walkouts and other activities more directly affecting employers. Some of the walkouts are only brief, to make a point, but some walkouts are spontaneous, such as over safety practices or pay practices during the pandemic.

Employers need to respond to these situations in legally appropriate ways, with increasing emphasis on employee morale and practical significance as well. It is not going to be easy! Our firm would love to have comments and suggestions regarding these issues, and any written comments can be sent to the editor at jww@wimlaw.com.

Cultural Sensitivity a Legal Necessity

Recent Developments. While many oppose the concept of "political correctness," in some senses it is now a legal necessity. And what is deemed culturally sensitive seems to be changing, sometimes in controversial ways.

Background. Consider the case of certain teachers, who have been disciplined and even terminated for quoting the words used in a legal case, for example, or even citing speeches by Martin Luther King. Many cases now suggest use of the "N" word in any context, whether a quotation from something else or not, warrants strong disciplinary action. In a recent example, a case involving an Emory law professor who was terminated for using a quotation from a legal case, the termination was overturned by a faculty committee, and the American Association of University Professors' made efforts to support the professor. The situation gets more complex where certain affected groups may use discriminatory language towards their own class members, who do not consider such language offensive since it is directed to themselves. The Equal Opportunity Employment Commission (EEOC) takes the position that offensive words used even among a protected class is prohibited and applies equally to everyone.

Is it quite questionable now to use the term "you people," for example, to refer to anyone. The term "boy" has been found in several rulings to be racially offensive and thus discriminatory, but a recent case finds the words "good

boy" not to be inappropriate. *Brown v. Dignity Health,* 2020 BL 29178, D. Ariz., 6/19/20. This writer recently has occasion to address the Supreme Court's recent transgender ruling, when an issue arose about the use of the word "queer." Apparently, young homosexuals or transgender persons and others like to describe themselves and use the term "queer," while the older generation finds the word to be highly offensive. Even terms like Black, African-American, Hispanic, Latin, Asian, and others are sometimes debated as to appropriateness.

The bottom line is that everyone must be extremely careful with the words they use. It simply is not worth the risk of offending someone by the use of terms that may be considered inappropriate. Perhaps "cultural sensitivity" is not the proper term, the concept is that one should avoid the risk of using words which may be offensive to some, i.e., "fighting words." Let's be tactful, and keep the best relationship possible with everyone.

Protection to Employers from Virus Lawsuits

Recent Development. The State of Georgia has joined several other states in legislation protecting employers from liability related to the Coronavirus. The Governor is expected to sign the law, thus adding Georgia to Louisiana, North Carolina, Oklahoma, Utah and Wyoming having such protection.

The Georgia law would shield employers, healthcare providers and other entities from liability related to the virus except in cases where the entity is found to have committed "gross negligence, willful or wanton misconduct, reckless infliction of harm, or intentional infliction of harm."

Republicans in the U.S. Senate are also proposing similar protective legislation where a worker is allegedly exposed to the Coronavirus in the workplace. Employers would lose their protection only if they have failed to make reasonable efforts to adhere to applicable public health guidelines and they committed an act of "gross negligence," or "intentional misconduct," according to draft documents. The bill would also protect employers "from liability and from agency investigation under federal labor and employment laws for actions taken to comply with stay-at-home orders and other public health guidance."

In noting the importance of such bills, readers should remember that in many if not most states, employers will be protected from claims of COVID-19 acquired on the job under workers' compensation provisions which require such compensation to be the exclusive remedy. However, there are exceptions in some states to such a limitation of liability and, in any event, even under the state legislation and proposed federal legislation, there may be an exception for gross negligence or intentional disregard for safety. Employers nevertheless desire the additional legislative protection which they hope will spare them time and expenses of defending themselves in court. Further, even under the proposed or enacted protected legislation, none of the legislation protects against complying with applicable laws pertaining to employment discrimination, leaves of absence, and retaliation against whistle blowers.