September 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-19 caused the noncompliance, and the steps taken to return to compliance.
- EPA does not expect to seek penalties in situations where they agree that "COVID-19 was the cause of noncompliance" and the entity provides the supporting documentation to the EPA upon request.
- Once the policy is no longer in effect, EPA does not plan to ask facilities to "catch-up" missed monitoring or reporting if it pertains to a requirement with intervals of less than three months. For semi-annual or annual obligations, EPA expects entities to take reasonable measures to resume compliance activities as soon as possible and note the reason for 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 August 13, 2020, EPA published its 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. EPA is not expected to make any substantive proposals on the MACT rule until mid-2021.

Boiler MACT Rulemaking/Litigation

Recent Developments. None. 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. None. 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. None. 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.

Industry 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 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" 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. 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.

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

Prepared by Kilpatrick Townsend.

ESA and New Definition of "Habitat"

Recent Developments. On August 5, 2020, the USFWS issued a proposed rule to define the term "habitat" under the ESA. The action is the result of the 2018 Supreme Court decision that noted the ESA's lack of a definition for the term which applicated any attempt to classify areas as "critical habitat." The proposed definition for "habitat" is as follows:

> *The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.*

The Proposed Rule requests comments on the proposed definition and possible alternative definitions. Comments are due by September 4, 2020. The ultimate decision on the definition of habitat will have a substantial impact on the reach and scope of the ESA going forward.

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 NEPA analysis.

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

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 Tri-Colored 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. SLMA will monitor the development of this potential rulemaking as it moves forward.

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

Recent Developments. All previously pending appeals of the January 2020 Order (discussed below) have been withdrawn. Litigation is complete, and this matter should be quiet until agencies complete their ongoing review of the species' listing status.

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.

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. On July 20, 2020, OSHA reached a settlement agreement with worker advocacy organization Public Citizen Foundation to release 2016 Form 300A data submitted by covered employers pursuant to the electronic reporting rule. OSHA was ordered to release the data to the Public Citizen by August 18, 2020, and the data has since been posted on Public Citizen's website at https://www.citizen.org/litigation/public-citizen-foundation-v-department-of-labor-osha-form-300a-records/. Despite the settlement agreement, OSHA continues to take the position that Form 300A data is confidential commercial information and will not release it directly to the public.

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. 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. Additional information regarding the DHA requirement is below.

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 September 7, 2020. 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.

President Plays "Trump: Card in Virus Relief (Updated)

Recent Developments. Two virus relief packages have passed Congress and been implemented, each running slightly in excess of $1 trillion. They have provided a $600 per week federal supplement to state unemployment benefits, so generous that a majority of workers on unemployment received more money than if they were working. That federal supplement expired at the end of July, and extensive negotiations occurred between the Administration and the Democrats over an extension and other pandemic relief, and the President then acted unilaterally.

Background. The Administration was unable to reach agreement with the Democrats, and much of the disagreement coming over the monetary size of the third package, the Democrats wanting some $3.4 trillion, and extension of the federal unemployment supplement to at least the end of the year, and additional aid to state and local governments, and others. The Republicans were pushing for employer protection from lawsuits resulting from workplace Coronavirus, as long as they make reasonable efforts to follow public health guidelines and did not commit acts of gross negligence or intentional misconduct. The Republican legislation includes an expanded version of the employer retention tax credit for businesses that keep workers on their payrolls.

With no end in sight in the negotiations between Administration and the Democrats, President Trump on August 8, 2020 issued a set of executive actions providing economic relief for the pandemic. The executive actions would reduce the $600 supplement in unemployment compensation that expired in July to $400, or $300 in the case of the states that are unwilling to add the remaining $100 from their own budgets. The new plan would cover weeks of unemployment insurance from August 1 to December 27, 2020, or when the government's Disaster Relief Fund balance drops to $25 billion, whichever occurs first. This means that under the unemployment laws of many states, those states will be paying approximately $700 per person per week.

Another action gives federal housing officials broad discretion to prevent evictions. The third action would defer payroll tax payments for people making less than $100,000 a year. This deferral applies only to the employee's share of the Social Security taxes (6.2%) and only for the period September through December. The fourth part of the President's executive actions relates to student loan relief.

Treasury Secretary Mnuchin said there will be no cuts to Social Security from the deferred payroll tax collection, and that Social Security benefits would be paid from the general federal budget. On August 11, 2020, Secretary Mnuchin expressed the Administration's call for Congress to forgive the payroll tax liabilities that President Trump deferred, and that the Treasury is working on guidelines for the payroll tax deferral. At the same time, he indicated that the delayed levies that fund Social Security would be optional for companies to implement, rather than mandatory. This means that employers must decide whether to change paycheck withholding.

Employers must decide how they will deal with the payroll tax deferral issue and some may explain their decisions to employees. The President's executive action provides that payments of the taxes is deferred not waived. Employees may be expecting the deferred taxes to be in their paychecks, but employers have the obligation to withhold and pay the taxes. If some employers do not withhold the taxes and do forward the money to employees, employers may have to pay the taxes later if Congress does not act to waive collection of those taxes. If employers

want to recover the money from employees next year, employers should explain to employees that the payment is merely an advance that may be recovered next year from the employees' wages. Of course, employers may not be able to recover the money with respect to employees who leave. Also, employers must address wage and hour issues. Employers choosing this approach should consult with legal counsel.

Alternatively, employers could continue to withhold the money and wait on the government to provide additional guidance. If Congress waives payment of the taxes, the money could be distributed to employees after the waive is announced. If the government does not waive payment of the taxes, employers who choose this approach will have the money to pay the taxes. If employees ask questions, they could be told that it would be difficult for employees to pay the money in January in a lump sum. Because of the various complications, most employers will likely choose to continue to withhold the employee payroll tax.

Two forms of uncertainty exist regarding these developments. One is that the Administration will have to clarify and potentially revise some of the specifics. The other is that there may be litigation over the President's authority to take such sweeping executive actions. There is much irony in the important aspects of the President's executive actions, in that Democrats support many of the measures the President took, although they might have taken even more aggressive steps. Further, the Democrats may not want to be on record in opposing matters crucial to those adversely affected by the pandemic. There are even legal questions such as standing, as to what entity has a right to sue to stop the executive actions.

Thus, employers must decide whether to stop withholding the employee portion of such taxes effective September 1, 2020. It may be helpful to prepare a communication to employees that explains the program and its temporary nature. It is suggested that such a memo be issued as late as possible since additional guidance from the government may be received.

NLRB Rules Broader Restrictions in Social Media Policies Are Lawful

Recent Developments. Employers have long sought to limit adverse comments about the employer, its management, and coworkers, with limitations in handbook and social media policies. Many of these restrictions have been successfully challenged by employees or unions on the grounds they restrict legitimate "protected or concerted" activities under the National Labor Relations Act (NLRA). In other words, the Labor Act grants workers broad rights to criticize their employer. A decision of the National Labor Relations Board (NLRB) on August 7, 2020, gives an employer broader rights to protect its reputation. *Bemis Company*, No. 18-CA -20267.

Background. The decision overturning an administrative law judge's ruling to the contrary, provides helpful guidance for employers that want to lawfully limit employee speech on online platforms. That policy stated:

> Employees are expected to be respectful and professional when using social media tools. With the rise of websites like Facebook, MySpace, and LinkedIn, the way in which employees can communicate internally and externally continues to evolve. We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis.
>
> Employees Should:
> - Communicate in a respectful and professional manner;
> - Avoid disclosing proprietary information, and
>
> Each employee is responsible for respecting the rights of their coworkers and conduct themselves in a manner that does not harass, disrupt, or interfere with another person's work performance or in a manner that does not create an intimidating, offensive, or hostile work environment.

In addressing the above social media policy, the Board found that in analyzing the lawfulness of a work rule, particular phrases should not be read in isolation. The Board went on to find that an objectively reasonable employee would understand that the first paragraph of the rules set out a general expectation that is more fully

defined by the explanatory language that follows: "When read in its entirety, Bemis makes clear that, to safeguard the reputation and interest of the company, employees referring to the company on social media must be respectful and professional, must not disclose proprietary information, must respect their coworkers, and must not harass, disrupt, or interfere with another person's work or create an intimidating, offensive, or hostile work environment." The Board went on to find that the rule would not interfere with the exercise of an employee's rights, and thus is entirely lawful. The Board also upheld the administrative law judges' ruling that the guidelines in the employer's employee handbook rule was entirely lawful as follows: "Do not make or publish false, vicious or malicious statements concerning any employee, supervisor, the company or its products."

EEOC Approves Worker Wellness Plans Initiative

Recent Developments. On June 11, 2020, the EEOC commissioners voted 2-1 to move forward with a Notice of Proposed Rulemaking (NPRM) for wellness programs. The EEOC did not actually publish the NPRM and adoption of a final rule is a long way off, in terms of time and procedural steps that must be completed along the way, but the discussion at the June 11 public hearing provided some insight into where the Commission seems to be headed. Before looking at what we understand from the June 11 meeting, a brief review of where we are may be helpful.

Background. The Americans with Disabilities Act (ADA) allows employers to adopt "wellness programs" as long as participation in the program is voluntary. The Genetic Information Non-Discrimination Act (GINA) also includes an exception allowing employers to collect genetic information as part of a wellness program as long as participation is voluntary.

There has long been debate about when a wellness program is voluntary, particularly if there is any kind of incentive or punishment for participating or not participating in the program. The Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act, has long allowed employers to offer incentives of up to 30% of the cost of health insurance to promote wellness program participation. The HIPAA rule applies only to what are known as "health contingent wellness programs" - that is, programs in which the reward is conditioned on satisfaction of health-related factors, for example, maintenance of blood pressure within certain limits. In 2016, in a reversal of its long-held position, the government adopted a Rule under the ADA as well as a Rule under GINA stating that a wellness plan is voluntary as long as it includes an incentive or penalty that is no more than 30% of the cost of self-only coverage. The ADA and GINA Rules applied to both participatory wellness plans—those that include an incentive or punishment merely for participating, or not, as well as health contingent plans.

AARP brought suit against the EEOC challenging the 2016 Rule, and in late 2017 AARP prevailed. The district court held that the EEOC failed to follow the necessary procedures in adopting the 2016 rules and that the rules were, therefore, arbitrary and capricious. The court ultimately enjoined the EEOC from following the Rules. This is where things sat until June, when the EEOC announced its intention to adopt a NPRM. As mentioned, the NPRM has not been made public and before it will be reviewed by the Office of Management and Budget (OMB), then likely revised by the EEOC, and then reviewed again by OMB. Although we are a long way from having the NPRM issued, that is what we know from what was said at the Commission's meeting.

The EEOC's proposed rule will focus on when participation in a wellness program is truly voluntary. Most wellness programs that provided incentives to employees in order to obtain health information will be considered coercive and prohibited. According to what we know, the NPRM will likely state that de minimis incentives are not coercive, but that incentives not deemed to be de minimis are coercive. Those that are coercive will be considered to violate the ADA and GINA. The big question to which the EEOC has not spoken is the standard that will be used to determine whether an incentive is de minimis or too high and therefore coercive.

The proposed rule will also prohibit employers from punishing or taking any adverse action against an employee who refuses to participate in the company's wellness program or an employee who participates but does not achieve specified outcomes. Similarly, employers will be prohibited from denying an employee coverage under any of its health plans.

The EEOC gave us a glimpse of where it is headed with respect to health contingent wellness and it involves the ADA's "safe harbor" provision. The safe harbor provides that insurers and plan administrators do not violate the ADA if they use medical information for underwriting risks or classifying risks, or if they administer risks in a way that is not inconsistent with applicable state law. In the past this has meant that health information could be used in the aggregate for determining actuarial risk. The EEOC has indicated that the NPRM will propose that health contingent wellness programs that meet ACA/HIPAA requirements will be exempted from the de minimis standard with the ADA's "safe harbor." The practical impact of this is that, for the first time, a wellness program that is tied to a health insurance plan will be able to use an individual's health information obtained from a wellness program to impose a penalty of up to 30 percent of premiums for those who do not meet biometric goals related to things such as weight or blood pressure.

It remains to be seen exactly what the NPRM will look like. Once the proposed rule is issued, interested parties will have an opportunity to file comments before a final rule is developed. One of the three EEOC Commissioners, Commissioner Burrows, has signaled significant concerns that the proposed rule, at least with respect to the safe harbor, is a change from the EEOC's long stated position and prior judicial determinations, and that the change is neither justified nor appropriate. Commissioner Burrows also raised concerns about the confidentiality of medical information and she also noted that health contingent wellness programs most heavily impact low wage workers, as well as older workers and those of color, meaning these workers are most likely groups to be penalized for failing to meet health outcomes. We will have to wait to see how these issues are all resolved.