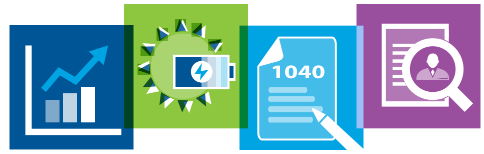
Energy Insights



An Update from the Fourth Quarter of 2014

By Robert S. Winner, A. Donald Lepore III, Dennis A. Clifford and Philip L. Comella

In this edition of Seyfarth Shaw's Energy Insights Newsletter our Energy and Clean Technologies team covers important developments in Q4 2014 for the energy industry including 1) new federal and state regulations on "fracking", even during the precipitous drop in oil prices, 2) year-end tax extensions for, among other things, renewable energy projects, and 3) mass layoff rules in the wake of oil and gas industry troubles.

"Fracking" Continues to Create a Wedge Between Government and Business

2014 has proven a tough year for the oil and gas industry. With oil prices at the end of 2014 hovering around $50 / bbl, a number of new regulations, and bans, have come into effect, wreaking further havoc.

At the federal level, The Occupational Safety and Health Administration (OSHA) has just released a new Safety Bulletin entitled "Hydraulic Fracturing and Flowback Hazards Other than Respirable Silica" (OSHA 3763-12 2014), which is intended to "educate and protect workers" and provide "preventative strategies" during the hydraulic fracturing process. Hydraulic fracturing involves pumping large volumes of fluid blended with proppant and chemicals at pressures necessary to fracture a hydrocarbon containing formation. According to OSHA, each year, an estimated 35,000 wells are hydraulically-fractured in the U.S. Since the oil and gas extraction industry as a whole has a relatively higher fatality rate compared to most of the U.S. general industry, OSHA has prepared and published the Safety Bulletin, which, among other things, sets out and divides the primary tasks and issues associated with hydraulic fracturing and flowback, lists hazard information and analysis for hazards during transport, rig-up, and rig-down, mixing and injection, pressure pumping, flowback operations and employer responsibility to protect workers. Employers in these industries are encouraged to review this new OSHA publication and update its policies and training materials to limit its exposure as OSHA inspectors that visit are expected to have an active knowledge of this information, and will be looking to see if such prevention strategies have been implemented.

At the state level, the Illinois Department of Natural Resources' has published final rules requiring, among other things, oil and gas companies to disclose water use volumes, chemicals used in their fracking fluids, and anticipated flowback rates of fracking fluid to the surface, test wastes and fracking fluids for radioactivity, require monitoring of air emissions during flowback and production, and require companies to restore land to its original condition once drilling has ceased. The State of New York recently voted to ban fracking altogether and in Denton, TX, the home of the Barnett Shale, the city's residents recently implemented their own ban on fracking. The courts will be forced to take up the Texas city's ban on constitutional grounds since the Texas Oil and Gas Association filed its lawsuit immediately following the vote and the ban's implementation.

The combination of falling oil prices along with new regulations in hydraulic fracturing are sure to put pressure on the oil and gas industry for the foreseeable future.

2014 Tax Extenders Include PTC and ITC For Renewable Energy Projects

On December 19, 2014 President Barack Obama signed into law The Tax Increase Prevention Act of 2014 (the "2014 Act"). The 2014 Act extends a number of tax relief provisions that expired in 2013 or 2014, including the Investment Tax Credit (ITC) and Production Tax Credit (PTC) for qualifying renewable energy facilities. Prior to the this extension, renewable energy projects needed to have "begun construction" prior to January 1, 2014 in order to be eligible for the PTC or the ITC (for a summary of the IRS' guidance regarding meeting the "begin construction" test, see our prior release). With the passage of the 2014 Act, renewable energy projects will now be eligible to earn the ITC or the PTC if construction has begun on such projects prior to the end of 2014. While this extension may have the welcome effect of grandfathering in a number of current projects that missed the 2014 deadline, many industry participants believe that the extension will have a negligible effect on incentivizing new projects and investments as there is simply insufficient lead time to "begin construction" on new projects, which typically take months of planning and preliminary work and analysis before breaking ground, prior to year-end. As such, these industry participants continue to express their desire for a more permanent extension of the ITC and PTC to encourage investment in and development of the country's renewable energy infrastructure.

In addition to the PTC and ITC, the 2014 Act allocated an additional $3.5 billion of new market tax credits for 2014 and extended the 50% percent bonus depreciation to property acquired and placed in service during 2014. These tax provisions are frequently important in financing renewable energy projects and, while subject to the same timing constraints as the PTC and ITC, are a welcome development for the industry.

Warning Of Expected Mass Layoffs

With oil prices recently hitting a five year low, many energy companies are planning large-scale layoffs over the next few months. When implementing these layoffs, employers should consider whether they are required to send advance notice to affected employees under the federal Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 et seq. and 20 C.F.R. Part 639. Failure to do so may result in costly class-action litigation and civil penalties.

WARN requires certain employers (100 or more employees, excluding "part-time employees") to provide qualifying employees and governmental agencies with written notice at least 60 days prior to a qualifying "plant closing" *or* "mass layoff." Part-time employees are those who average fewer than 20 hours per week, as well as those who have worked fewer than 6 of the preceding 12 months. Employers are also covered if they employ more than 100 employees (including part-time employees) who work at least 4,000 hours per week in the aggregate. Covered employers must issue notice 60 days before a "plant closing" or "mass layoff." To determine whether notice is required, employers must carefully examine the definitions of each term. A plant closing is any shutdown of a single site of employment, or one or more facilities or operating units within the site of employment, if the shutdown results in an "employment loss" at the site during any 30-day period for 50 or more employees (excluding part-time employees). Note that the term "plant" is somewhat misleading because WARN is not limited to manufacturing plants. A mass layoff is any reduction in force that results in an "employment loss" at a single site of employment during any 30-day period for: (a) 500 or more employees (excluding part-time employees) *or* (b) 50 to 499 employees (excluding part-time employees) if that number constitutes at least 33 percent of the active employees at the site (excluding part-time employees). An employment loss is a layoff (but not a temporary layoff of less than six months), a voluntary departure or retirement, or a greater than 50-percent reduction in work hours. However, under certain conditions, an employment loss does not occur if the employer offers to transfer the employee to a different employment site.

When planning layoffs, employers should consider all employment losses that have occurred in the prior 90 days and those that are reasonably expected to occur in the next 90 days. WARN creates a presumption that a plant closing or mass layoff has occurred when separate employment losses occur within the same site of employment, if—*when the employment losses* *over a 90-day period are added to together*—they meet the minimum thresholds to trigger coverage. In such circumstances, the employer must then demonstrate that the employment losses resulted from separate and distinct activity. Employers should also be aware that the 90-day aggregation rule precludes the aggregation of two events if either one itself is large enough to trigger coverage. Employers should issue the written notice to all "affected employees"—either directly to the employees or to their union representatives if they are represented. Affected employees are those whom the employer may reasonably expect to experience an employment loss as a consequence of a proposed plant closing or mass layoff. In addition, the employer must provide notice to applicable State and local authorities. Employers who fail to properly issue written notice to affected employees are required to pay up to 60 days of back pay and benefits to each aggrieved employee, and employers who fail to provide written notice to the applicable government authorities are subject to a civil penalty not to exceed $500 for each day of violation. The back-pay awards and civil penalties are subject to reductions and offsets under limited circumstances. In addition, the prevailing party in WARN litigation is entitled to recoup its reasonable attorneys' fees, which can be fairly significant in the class-action context.

Compliance with WARN requires careful and detailed planning. Employers should also take note that a number of states, including but not limited to California, New York, Illinois, Wisconsin, New Hampshire, Iowa, and New Jersey, have enacted mini-WARN statutes with requirements that differ from the federal WARN. Thus, given the complexity of WARN and the varying state-law requirements, it is advisable to consult with experienced employment counsel when planning large-scale layoff activities.

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