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An ILMA Virtual Town Hall:

What's Coming Up in 2023?

The webinar will begin shortly.



What's Coming Up in 2023?

- R&D Tax Credit
- Plastics Regulation
- PFAS Restrictions
- Other Chemicals Regulation
- Hazard Communication Updates
- Trade Issues
- More Trends to Watch

R&D Tax Credit

- Credit is Economic Stimulus to Keep Innovation & Creativity in U.S.
- Originally enacted by Congress in 1981
 - Extended 16 times
 - Permanent federal incentive in 2015 (PATH Act)
 - 40+ States have R&D incentive programs
- Qualitative Four-Part Test
 - No reverse engineering
 - No ownership of IP
 - Qualified R&D spending takes place in many areas, not just R&D
- ILMA Members Have Sought to Maximize R&D Tax Credit

R&D Tax Credit

- Historically, 100% of Section 174 R&D Expenditures Could Be Deducted in Current Tax Year
 - Or, capitalized over a period of no less than 60 months
- Tax Cuts and Jobs Act of 2017 (Trump)
 - Requires capitalization and amortization after 12/31/2001
 - IRS issues updated guidance in Revenue Procedure 2023-11 (12/15/2022)
 - Effect on taxpayers is significant - cash constraints in slowing economy
- Business Groups Urging Permanent Extension of 100% Deduction
 - Extension has been tied to political compromise on child tax credit
 - Estimate that restoring tax credit would create 81,000 direct jobs
 - “Marginal” legislative confidence - upcoming debt ceiling fight

Plastics

- Major Types of Legislation for Plastics Packaging
 - Post-consumer recycled (PCR) content
 - Chemical recycling (advanced manufacturing)
 - Extended Producer Responsibility
- Extended Producer Responsibility
 - Extends responsibility of producers over the entire life cycle of their products
 - Shifts costs from taxpayers to use less and more recyclable packaging
 - Growing interest in U.S.
 - More widely adopted in Canada and European Union
 - Regional access to HDPE reclamation plants is commercially limited

Plastics

- Extended Producer Responsibility (EPR)
 - Laws enacted in California, Colorado, Maine and Oregon
 - Legislative initiatives in other States (active bills in Northeast)
- Two Models - Municipal Reimbursement and Full Producer Responsibility
 - Municipal reimbursement
 - Stewardship group reimburses local government for trucks, sorting, and operational expenses
 - Model for Maine and Oregon
 - Full producer responsibility
 - Producer responsibility organization (PRO) manages recycling process
 - American Coatings Association's Paint Care is an example
 - Model for California

Plastics

- Post-Consumer HDPE Lubricant Packaging
 - Low recycling rates because considered “contaminated” due to residual product
 - Pigmented HDPE is 7.5 times less likely to be recycled
 - Most collected bottles are landfilled or incinerated
 - Canada claims 85% recycling rate
- Build Out of California and Maine EPR Programs in 2023
- National Lubricant Container Recycling Coalition
 - 11 current members
 - Pilot program to collect bottles in Atlanta, GA area
- See April 2023 *Compoundings* feature

PFAS - perfluorinated alkyl substances

- Awareness – “forever chemicals” are everywhere
- Regulatory environment changing rapidly
 - EPA – enhanced Toxic Release Inventory (TRI) reporting
 - EPA – proposal to designate certain PFAS as CERCLA hazardous substances
 - States – many states now taking action
- Insurance, liability issues
- ILMA can provide list of analytical laboratories
 - [Laboratories Accredited for PFAS Analysis](#)
 - [EPA Method 537.1](#)

PFAS

- October 2022 Study Estimates 57,412 Untested Chemical-Related Manufacturing Sites Across U.S. (*Environ. Sci. Tech. Lett. 2022*)
- ILMA Members should:
 - Assess PFAS use
 - Current and past uses
 - How acquired, handled and disposed
 - Properties owned
 - Locate and review past and current insurance policies
 - Understand the trend line
 - More stringent restrictions
 - Engage with POTWs
 - Engage legislators and regulators

PFAS Resources

- [What to Know About Forever Chemicals \(WSJ\)](#)
- [Inhance Illegally Making PFAS, Unsealed EPA Complaint Alleges \(bloomberglaw.com\)](#)
- [PFAS Litigation Begins 'Tip of the Iceberg' Turn Toward Insurers \(bloomberglaw.com\)](#)
- [Changes to TRI Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern | US EPA](#)
- [Proposed Designation of Perfluorooctanoic Acid \(PFOA\) and Perfluorooctanesulfonic Acid \(PFOS\) as CERCLA Hazardous Substances | US EPA](#)

Chemicals Regulation

- US EPA New Chemicals (i.e., synthetics, additives)
 - Increasing data requirements
 - Restrictions are routine
 - Delayed start time for review
 - Staff shortages
 - Staff inexperience
 - Recent completion timing:
 - Low Volume Exemption (LVE) - 6 to 8 months
 - Pre-Manufacture Notification (PMN) - 14 to 18 months
 - Managing EPA review process is essential

Hazard Communication

- ▶ Canada: Workplace Hazardous Materials Information System (WHMIS)
 - ▶ [Amendments to Hazardous Products Act](#) published Jan 4, 2023
 - ▶ Three-year transition (to 12/14/25); defined ranges for trade secret ingredients; changes in some classification criteria; physical properties (Sec 9)
- ▶ OSHA: Expect changes to HCS to be published shortly.
 - ▶ Transition period?
 - ▶ How will trade secret ingredient ranges, “normal conditions of use,” “foreseeable emergencies” and “date released for shipment” issues be defined and codified?
 - ▶ Impact of Canada - U.S. Regulatory Cooperation Council: one SDS for both countries?
- ▶ ILMA will disseminate information as it’s available
 - ▶ Health Canada webinar on amendments to the HPR - [presentation](#) & [recording](#)

Trade

- China
 - Forced labor is a growing issue
 - Expanding well beyond Xinjiang Region
 - Uyghur Forced Labor Prevention Act
 - Applies to direct and indirect imports (entire downstream supply chain)
 - US Importer bears obligation to confirm compliance
- Europe
 - US sanctions concerning Russian petroleum
 - Requirements continue to change concerning US and EU imports

More Trends to Watch

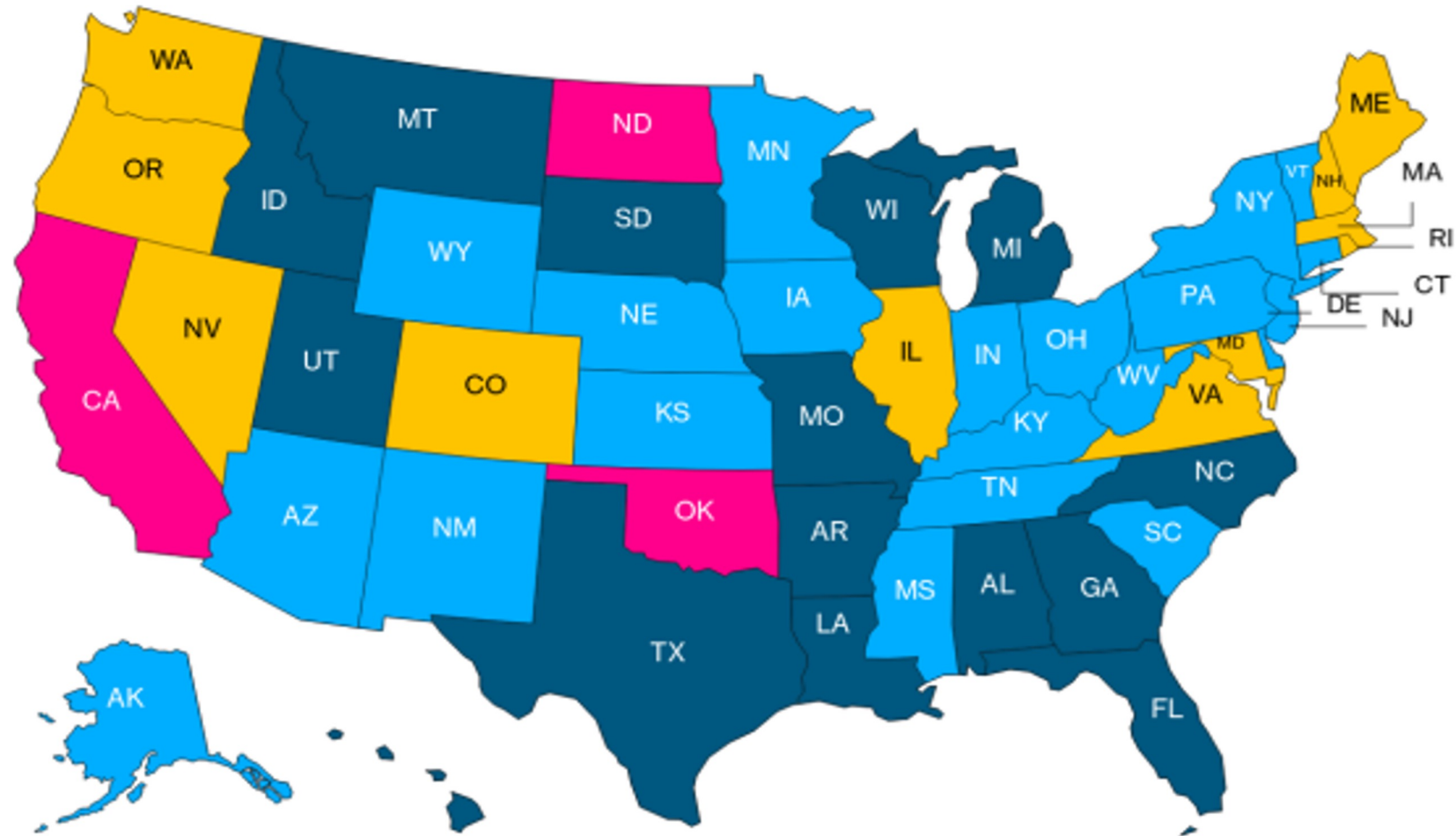
- FTC Proposed Non-Competes Rule
 - ILMA to submit comments (deadline extended to April 19)
 - *Compoundings* March 2023: [“Drafting Restrictive Covenants in Today’s Environment”](#)
- Supply Chains
 - LubeTrends Live! Town Hall: “Supply Chain Check-in: What Have We Learned?”
 - ILMA Engage 2023, April 20-22, Tucson, AZ

FTC Proposed Non-Compete Rule

- Three Critical Components of Proposed Rule
 - Prohibit employers from entering into non-compete agreements with workers
 - Requires express notice to current and former employees
 - Requires employers to rescind existing non-compete agreements
- Proposed Rule Would Apply to All “Workers”
- *De Facto* Non-Competes
 - Broad and unusual non-disclosure agreements
 - Unreasonable training cost repayment obligations’
 - Non-solicitation agreements that prohibit activity throughout an industry
- Rule Preempts Inconsistent State Laws, But Not Those *More* Restrictive

State Limits on Employee Noncompetes

- Allowed if not overly broad
- No statute on noncompetes*
- Largely banned
- Banned for low-wage/hourly workers



Source: Bloomberg Law analysis
*Case law allows noncompetes if not overly broad

FTC Proposed Non-Competes Rule

- What Could Happen Next With FTC Rulemaking?
 - May be narrower (e.g., highly-compensated employees treated differently, rebuttable presumption)
 - Certain legal challenges
- What Should Company Do to Protect Itself
 - Better tailor non-disclosure agreements
 - Reasonable definition of “confidential information” and possible carve outs
 - Better tailor non-solicitation agreements
 - Tether the obligation to “confidential information”
 - Limit the obligation to customers for which employee had access to “confidential information”
 - Reasonable temporal limitations

Supply Chain

- Challenges in 2023
 - Continued backlogs/shortages of raw materials and supplies
 - Ongoing labor shortages
 - Trucking still struggling to attract drivers
 - “Quiet quitting” and cultural changes (e.g., ESG)
 - Growing cyberthreats
 - Globalization challenges
 - China tensions
 - Ukraine-Russia conflict
 - Reshoring
 - Extreme Weather
 - Sustainability/ESG pressures - “Go Green”
 - Changing legislation/regulation
 - “The Ocean Shipping and Reform Act of 2022”
 - Surface Transportation Board

Supply Chain

- East Palestine, OH Derailment (02/03/23)
 - Rail safety push with new legislation, regulations and penalties
 - Bipartisan in nature
 - Criticism of DOT (Mayor Pete), EPA and White House response
 - Right to know what is coming through my neighborhood
 - Broken rail insurance market
 - Railroads cannot access enough coverage for worst-case disasters
 - \$1.5 billion is current highest coverage limit
 - Improved braking systems for “chemical trains”
 - 2015 rule was narrowly scoped for trains carrying crude oil
 - DOT rolled back rule entirely in 2017
 - Expect rail shipping costs to increase