FEDERAL Employment Law Insider

An update on new federal law and regulation affecting your workplace

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IMMIGRATION REFORM

How immigration started the government shutdown

by Sara Nasseri
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Although the federal government shutdown is now temporarily over, there is even more pressure on Democrats and Republicans to reach a compromise and end the stalemate. But before we discuss how a solution can be reached—or if that's even a possibility at this point—let's examine the issue that really sparked it all: immigration.

President Donald Trump has made it undeniably clear that he will do whatever he can to overhaul the U.S. immigration system, from limiting H-1B visas to building a wall across the Southwestern border. Indeed, the president's focus, when he issued his "Buy American, Hire American" Executive Order in April 2017, was on reforms that would control how and to what extent H-1B visas are issued. There have been a number of rules proposed, ranging from narrowing the definition of "specialty occupation" to reworking the annual H-1B lottery program, which U.S. Citizenship and Immigration Services (USCIS) has run for the past several years. There is also a proposal to rescind an Obama-era regulation that provides work permits to the spouses of H-1B workers who are waiting for green cards.

Despite the proposals that have been floated, the president recently tweeted what many deemed to be a "softening" or a "change of heart" on H-1Bs. On January 11, he tweeted, "H1-B holders in the United States can rest assured that changes are soon coming which will bring both simplicity and certainty to your stay, including a potential path to citizenship." He didn't provide any specifics, but his tweet suggested more favorable terms for H-1B visa holders, a drastic change from his past threats to create more restrictive policies.

Regardless, the Trump administration has made clear since day one that immigration is of the utmost priority, and passing laws to overhaul the system and toughen up border security, including building a wall, are one of its primary focuses. In yet another tweet on December 28, the president threatened to close the border with Mexico completely if the Democrats wouldn't agree to a deal to "finish the Wall & also change the ridiculous immigration laws that our Country is saddled with."

Let's recall that the whole shutdown began with disagreements over the issue of immigration and, specifically, funding of the "wall." It was in a meeting with Senate Minority Leader Charles E. Schumer (D-New York) and soon-to-be House Speaker Nancy Pelosi (D-California) that President Trump made it clear that he would shut down the government if Democrats didn't agree to fund a wall. On January 19, President Trump suggested a compromise that offered to restore the

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Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS) programs for three years if Democrats backed a scaled-down version of his proposed border wall. The Democrats rebuffed his offer.

Although there has been a deal to reopen the government for three weeks, only time will tell how things will play out and if major changes to the immigration system will be implemented. We will continue to stay tuned.

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INSIDE THE NLRB

Browning-Ferris: Court's ruling pushes joint-employer standard further out of joint

by Burton J. Fishman
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It's likely that no one believed the saga over the National Labor Relations Board's (NLRB) joint-employer standard could get any more complicated. Most observers were waiting for a definitive opinion from the U.S. Court of Appeals for the District of Columbia Circuit that would (finally!) bring some clarity to an issue—and a case—that has become mired in internecine strife and congressional interventions. So much for "best laid plans."

On December 28, 2018, the D.C. Circuit issued a decision of such profound ambiguity in *Browning-Ferris Industries of Cal., Inc. v. NLRB* that various news sources differed over whether the NLRB's original decision had been affirmed or denied. So where are we now? First, let's take a look at the decision.

In the controversial case before the court, the NLRB held that it would no longer require that an entity exercise "direct and immediate" control over another entity's workers to establish a joint-employer relationship. Instead, the Board said that it would consider both reserved and indirect control—e.g., through an intermediary or through contractual provisions that reserve the right to control—as evidence of a joint-employer relationship, even if the right to control is never exercised. That was a profound change to Board precedent that had required a joint employer to have "direct and immediate" control over the fundamental terms and conditions of employment (e.g., making hiring, pay, scheduling, disciplinary, and discharge decisions).

In its ruling, the court seemed to want to split the baby à la King Solomon but wound up with something closer to infanticide. First, the court held that an employer's reserved right to control and its indirect control could be considered as factors for determining whether it is a joint employer with another business. However, the majority also ruled that indirect control is relevant to the joint-employer analysis only if it relates to essential terms and conditions of employment. The court went on to state that often-cited elements of "indirect control," such as contractual objectives, basic ground rules, and expectations of a third-party contractor, are "inherent to contractual business relationships" and therefore are not the essential terms and conditions that could enter into the analysis. Got it?

In any event, because the NLRB failed to explain which terms and conditions of employment are "essential," the court remanded the case to the Board (i.e., sent it back) for further proceedings consistent with its opinion. Such a remand is unlikely to be undertaken. It's almost certain that ethics challenges would again be launched at Board member William Emanuel on "issue preclusion" grounds, and that distracting civil war would take months to resolve. And if Emanuel recused himself a second time, there would be a 2-2 split among Board members along party lines, yielding no resolution.

It's much more likely the NLRB will increase its efforts to finalize a regulation addressing the joint-employer issue. Democratic members of the House of Representatives have already begun lobbying NLRB chair John Ring, asserting the appellate decision foreclosed the issue and made the rulemaking superfluous. Ring's response provided a cogent analysis of the court's decision as well as a strong statement of the Board's position. He forcefully asserted the NLRB's independence while indicating that he understands how the forthcoming regulation must be adjusted to satisfy the court's concerns, both about a clear articulation of the "essential terms and conditions" of employment and about respecting the "common-law principles of agency."

Ring also acknowledged that the court's decision would generate additional comments on the proposed regulation. As a result, the deadline for comments was extended yet again, this time to January 28, 2019. Whether the Board can meet the indistinct standard established by the court and survive the inevitable judicial review remains to be seen.

At a critical point after the Battle of Britain, Winston Churchill remarked, "This is not the end. It is not even the beginning of the end, but it is, perhaps, the end of the beginning." With the *Browning-Ferris* ruling, we may have reached the end of the beginning of the joint-employer saga, and the lengthy process of drafting the regulation can now move on. But as congressional posturing and the thousands of comments already offered

indicate, the proposed regulation will only be a new beginning for the joint-employer issue. An end is nowhere near, but at least it's in sight.

NLRB makes it easier to classify workers as independent contractors

On Friday, January 25, 2019, the National Labor Relations Board (NLRB) reversed an Obama-era decision and made it easier to classify workers as independent contractors. The SuperShuttle decision, by Republican members John Ring, Bill Emanuel, and Marvin Kaplan, rejected the Obama Board's decision in FedEx, saying it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminished the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." The 2014 NLRB had rejected a D.C. Circuit decision that put workers' entrepreneurship front and center in the analysis in the common-law test for deciding whether workers are employees.

According to the Republican majority in SuperShuttle, "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" because "employer control and entrepreneurial opportunity are opposite sides of the same coin." The majority applied the revised test to find the employees of SuperShuttle were contractors. Democratic member Lauren McFerran dissented.

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INSIDE THE EEOC

EEOC attempts to work around lack of quorum

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On January 3, 2019, the opening day of the 116th Congress, the Equal Employment Opportunity Commission (EEOC) lost its quorum when commissioner Chai Feldblum's term ended. With the Senate's failure to confirm Feldblum as well as Janet Dhillon as EEOC chair or Daniel Gade as a commissioner before the 115th Congress ended, the agency was left with only two seated commissioners—Acting Chair Victoria Lipnic, a Republican, and commissioner Charlotte Burrows, a Democrat.

Senators Marco Rubio (R-Florida) and Mike Lee (R-Utah) blocked Feldblum's reconfirmation over her views on LGBT rights, refusing to agree to a year-end deal to confirm a number of President Donald Trump's nominees. Then Gade withdrew his name from consideration at the end of December. The Trump administration will have to resubmit its nominations of Dhillon for EEOC chair and Sharon Fast Gustafson for EEOC general counsel, restarting the confirmation process from scratch. And because Feldblum has indicated that she isn't interested in another term, the administration will have to find two new nominees to fill the open EEOC commissioner positions.

Before the 115th Congress ended, the EEOC set up a "work-around" for its expected lack of a quorum by delegating decision-making authority to its district office heads. The EEOC's district offices will have limited oversight to revoke or modify subpoenas under that delegation of power, while the head of the EEOC's Office of Federal Operations in Washington, D.C., can deal with day-to-day decisions affecting federal workers. Lipnic and Burrows must be notified before any final decision can be made.

Recent settlements and verdicts

EEOC v. UPS. United Parcel Service (UPS) has agreed to pay $4.9 million to settle the largest religious discrimination class action in the EEOC's history. The agency alleged that UPS refused to hire applicants who wear beards and long hair for religious reasons, relegated employees with religious-related beards and long hair to nonsupervisory positions with no customer contact, denied those employees promotions, and failed to provide them religious accommodations. The U.S. District Court for the Eastern District of New York signed off on the consent decree on December 21, 2018. In addition to paying the class members $4.9 million, UPS must revise its religious accommodation process as well as the forms job applicants and employees use to request accommodations.

EEOC v. Favorite Farms. On December 19, a federal jury awarded $850,000 in compensatory and punitive damages to a female farmworker at Favorite Farms who was raped by her supervisor and reported the crime to police and company management the same day it happened. The evidence at trial showed that management at Favorite Farms, a company in Dover, Florida, that primarily grows strawberries, failed to properly investigate the employee's complaint and instead sent her home without pay the following workday. Favorite Farms took no action against the harasser, leaving him to supervise women in the fields, despite evidence that this wasn't the first complaint of sexual harassment against him. Moreover, the company continued to retaliate against the victim and forced her to take a leave of absence.

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FEDERAL CONTRACTOR CORNER

ALJ refuses to dismiss OFCCP's lawsuit against Oracle

by H. Juanita M. Beecher
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A U.S. Department of Labor (DOL) administrative law judge (ALJ) recently ruled that the U.S. Supreme Court's January 2018 decision in *Lucia v. SEC* that ALJs at the Securities and Exchange Commission (SEC) were "inferior" officers of the U.S. government because they were hired rather than appointed through the president didn't require him to dismiss the Office of Federal Contract Compliance Programs' (OFCCP) lawsuit against Oracle.

Oracle had argued that the OFCCP's case should be dismissed because under *Lucia,* the DOL's ALJs were not properly appointed prior to December 2017. ALJ Richard Clark rejected Oracle's argument, finding that DOL Secretary Alexander Acosta's ratification of each ALJ appointment in December 2017 "remedied the Appointments Clause issue[,] and any other potential constitutional issues identified by [Oracle] should not prevent this matter from proceeding." The DOL filed suit against Oracle at the end of the Obama administration, alleging the company discriminated against women and minorities in its hiring and pay decisions.

Leen appointed OFCCP director

Craig Leen, previously the acting director of the OFCCP, was formally named the agency's director by the DOL on December 26. He took over for former OFCCP director Ondray Harris in July 2018.

Employer representatives meet with Leen, OFCCP leaders

On December 18, employer representatives met with Director Leen and his senior leadership. Leen and his senior leaders provided a status update on the agency's contractor recognition programs, affirmative action plan (AAP) verification program, and ombudsman position. Members of the Institute for Workplace Equality's advisory board then took turns asking questions on specific issues. Topics of discussion included compensation, focused reviews, the five-year audit moratorium, and long-open audits. The OFCCP provided helpful information on each topic.

Among the responses provided by the OFCCP, the following seemed to generate the most interest:

- On compensation, the OFCCP believes there's a difference between what it sees as systemic discrimination and the prohibitions on discrimination set out by Title VII of the Civil Rights Act of 1964, so it will look closely at cases in which similarly situated employees are paid differently. The agency encourages contractors to develop their own pay analysis groups (PAGs) and says it will accept such PAGs if they're "reasonable."
- The OFCCP indicated that contractors selected for focused reviews will be given notice and will receive compliance assistance. It appears that only contractors' corporate or regional headquarters will be subject to the audits. Leen stated that the next round of corporate scheduling announcement letters (CSALs) will be issued in early February. The CSALs will be posted on the agency's website rather than mailed to contractors.
- On the possibility of a five-year moratorium on audits, Leen noted that contractors can get the five-year moratorium through the new contractor recognition program or in the way the agency used it in its recent settlement with JBS USA.
- Finally, Leen said that he hates long-open audits and has put Deputy Director Marika Litras in charge of cleaning up old audits. Litras stated that if a contractor hasn't received a recent update on an old audit, it should reach out to the district director, and if the district director doesn't respond, the contractor should contact Litras directly.

The meeting was extremely informative. It is hoped that it will be only the first of a series of conversations between contractors and OFCCP leadership.

OFCCP open during shutdown

Although the partial government shutdown has closed the Equal Employment Opportunity Commission (EEOC) except for certain essential employees, the OFCCP is open. As part of the DOL, the OFCCP is fully funded for fiscal year 2019.

DOL announces 3 new ARB members

The DOL has announced three appointments to its Administrative Review Board (ARB). William

Thomas Barto, James A. Haynes, and Daniel T. Gresh were each appointed for two-year terms. Until the appointments were announced on January 8, the ARB hadn't issued a ruling since July 2018 because it had only one member, Leonard Howie. According to the DOL, Howie's term ended on January 5.

The ARB issues final agency decisions in cases arising before the DOL, including the OFCCP and the Wage and Hour Division (WHD), under a wide range of worker protection laws. The ARB's cases are generally appeals of rulings by the DOL's ALJs or the WHD administrator. Depending on the statute at issue, the parties may appeal the ARB's decisions to federal district courts or appellate courts and, ultimately, to the U.S. Supreme Court.

Deputy Secretary of Labor Patrick Pizzella, who led the selection process, recommended the appointments, which were accepted by Secretary Acosta. "The ARB's mission is to issue legally correct, just, and timely decisions," said Pizzella. "After a rigorous selection process, these members' expertise will be a valuable complement to the [DOL's] overall mission to protect the American workforce."

Here's an overview of the newly appointed members' expertise:

- Barto will serve as chair of the ARB. He was most recently an ALJ at the DOL, where he presided over formal adversarial hearings involving a wide variety of labor-related matters, including claims arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and dozens of other labor-related statutes and regulations that address whistleblowing, immigration, child labor, employment discrimination, and federal construction and service contracts.
- Haynes most recently served as an appellate ALJ for the Employees' Compensation Appeals Board, where he issued more than 11,000 decisions and orders.
- Gresh is an attorney for the ARB. He has participated in appellate review of complaints filed under a broad range of federal administrative labor laws, including financial, environmental, and transportation employee protection statutes; immigration, child labor, employment discrimination, and job training laws; contract and wage compliance laws; the McNamara-O'Hara Service Contract Act; the Davis-Bacon Act; and the Administrative Procedure Act.

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EEOC v. Wilmington Trust Corporation. Wilmington Trust Corporation has agreed to pay $700,000 to settle an EEOC disability discrimination lawsuit in a consent decree approved on December 21. According to the EEOC's lawsuit, Wilmington Trust's predecessor, Hudson City Savings Bank (HCSB), had a long-standing inflexible policy and practice of placing employees with impairments or disabilities on involuntary leave until they were cleared to return to work with no restrictions by a medical provider.

In addition to the $700,000 award, the consent decree includes a two-year injunction against policies or practices at Wilmington Trust that would require employees to work with "no restrictions" or otherwise deny employees with disabilities an interactive process to determine reasonable accommodations. Wilmington Trust will explicitly inform all former HCSB employees it currently employs, known as legacy employees, that HCSB's long-standing workplace accommodations and disability leave policy is no longer in effect. To further ensure that its legacy employees are aware of the change in policy, Wilmington Trust must conduct training on its disability discrimination policy, the Americans with Disabilities Act (ADA), the ADA's reasonable accommodation requirement, and other statutes enforced by the EEOC.

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POLITICAL APPOINTMENTS

President must renominate federal appointees not confirmed by previous Congress

by Sean D. Lee
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As expected, President Donald Trump kicked off 2019 by renominating a number of his previous picks to head key positions at the nation's federal labor and employment agencies. His pending nominations expired when the 115th Congress adjourned on January 3.

Within the U.S. Department of Labor (DOL), Trump announced the renomination of a number of appointees

who failed to receive final Senate confirmation, including Cheryl Stanton as Wage and Hour Division (WHD) administrator, Scott Mugno as Occupational Safety and Health Administration (OSHA) administrator, and William Beach as head of the U.S. Bureau of Labor Statistics (BLS). All three nominations were initially announced in the fall of 2017 and reported favorably out of committee but have since languished in the Senate.

On January 4, Bryan Jarrett, the acting WHD administrator, left the DOL to take a private-sector job in California. With his departure, Patricia Davidson, the deputy administrator for program operations, is now the highest-ranking individual at the WHD. Bloomberg reports that WHD senior policy adviser Keith Sonderling is likely to be tapped as the acting administrator until a permanent administrator is confirmed.

Trump also renominated Janet Dhillon to serve as chair of the Equal Employment Opportunity Commission (EEOC) and Sharon Fast Gustafson to be the EEOC's general counsel. Notably, he did not renominate Commissioner Chai Feldblum, a Democrat and staunch advocate for LGBT rights, to serve a third term. It's widely reported that Feldblum's nomination was stymied by Senators Marco Rubio (R-Florida) and Mike Lee (R-Utah), who oppose her positions on sexual orientation and gender identity issues.

The EEOC currently has only two out of the five commissioners seated—Victoria Lipnic and Charlotte Burrows—and thus lacks a quorum. Nominee Daniel Gade withdrew from consideration at the end of 2018, reportedly expressing his frustration about the glacial pace of the confirmation process.

Trump did not renominated Democrat Mark Gaston Pearce to serve a third term on the National Labor Relations Board (NLRB). The president's decision in August 2018 to renominate Pearce was met with ire from a number of business groups, who opposed the Obama appointee as too prounion. It remains to be seen who will be tapped to fill the NLRB vacancy.

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SEX DISCRIMINATION

International pay equity developments

by Consuela A. Pinto
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The focus on the gender pay gap continues to expand. While the UK is seeing a narrowing of the gap based on its pay reporting, France is not only requiring employers to report the pay gap but will after three years penalize employers who have not close the gap. Meanwhile, Canada is considering legislation to require private employers to close the pay gap in three year.

Impact of UK reporting requirement

Effective April 2018, private- and public-sector employers in the United Kingdom (UK) with 250 or more employees are required to publish information about their gender pay gap each year on their own website as well as on a government-hosted website. Specifically, covered employers must report average differences between men's and women's salaries and bonuses. Covered employers were required to submit their first report under the new law last April.

Early reports indicate that shining a spotlight on the pay gap has led to its narrowing. The UK's Office for National Statistics reported on October 25, 2018, that the gender pay gap in Britain shrank 8.6 percent among full-time employees, and the gender pay gap is almost nonexistent for workers between the ages of 18 and 39.

France takes naming and shaming to new level

France has joined the UK in requiring employers to publicly report pay gaps between male and female employees. But France is taking its commitment to pay equity to a new level by imposing fines on employers that underpay women. The country is also considering requiring companies to install software that would allow the government to directly monitor their gender pay gap.

In France, women reportedly earn nine percent less than men who hold the same jobs. As in other countries, French employers tend to hire men for more senior positions in industries with higher pay scales. Accordingly, in September 2018, France enacted a law similar to the UK law that requires companies to publish information about their gender pay gap. If a company's pay gap surpasses a certain threshold, it will be required to propose an improvement plan.

Starting January 1, 2019, French employers with more than 250 employees must report pay differences between men and women, using a range of government-approved metrics. Companies with pay gaps will have three years to eliminate the gap or face a fine of up to one percent of their total payroll. Smaller employers with 50 to 250 employees have until 2020 to comply with the new law.

Canada joins the pay equity movement

On October 29, 2018, Bill C-86, Budget Implementation Act, 2018, No. 2, was introduced in Canada's House of Commons. Bill C-86 includes new pay equity legislation, the Pay Equity Act. If passed, the Act will apply to federally regulated employers with 10 or more employees.

The Act is intended to remedy the following recent findings:

(1) Based on hourly wages, full-time working women make 88.5 cents for every dollar earned by men and

69 cents for every dollar earned by men when overall annual earnings are taken into account.

(2) Women tend to be relegated to lower-paying jobs and are significantly underrepresented in senior positions.

Under the proposed legislation, covered employers will be required to evaluate their compensation practices to ensure they are providing equal pay for work of equal value. (In the United States, this standard is referred to as comparable worth.) Moreover, within three years of being covered under the Act, employers must implement a pay equity plan that includes the following steps:

(1) Identify job classes within their workplace;
(2) For each class, determine gender representation, the value of the work performed, and the level of compensation;
(3) Compare the compensation associated with predominantly female classes with the compensation associated with predominantly male classes of similar value, identify predominantly female classes that require a pay increase, and set a deadline for implementing the increase.

Pay equity plans must be reviewed and updated at least once every five years. Certain employers are required to establish a pay equity committee to develop and update their pay equity plan. The Act also requires covered employers to:

- Post notices regarding their pay equity obligations and their compliance progress;
- Give employees an opportunity to comment on their pay equity plan; and
- File annual reports with the pay equity commissioner.

If the Act passes, the pay equity commissioner is expected to issue regulations providing details on how to identify job classes in which employees perform work of "similar value" as well as the types of analyses that would be deemed sufficient to identify pay disparities that require pay adjustments.

Bottom line

Global employers should continue to monitor international developments in pay equity and pay transparency laws. Laws are rapidly evolving, and each country has its own twist on compliance. The new year is a great time to get a handle on your compensation practices and global compliance obligations.

Practice tip: All compensation analyses or modifications to your company's compensation program should be done under the protection of the attorney-client privilege. Consult with legal counsel before undertaking any assessments of your compensation program.

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INSIDE OSHA

February 1 deadline for OSHA 300A summaries looms

by Lindsay A. DiSalvo, Dan C. Deacon, and Eric J. Conn
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This is your yearly reminder about the important February 1 deadline to prepare, certify, and post your OSHA 300A annual summary of workplace injuries and illnesses. All U.S. employers, except those with 10 or fewer employees or those whose NAICS code is in the set of low-hazard industries exempt from OSHA's injury and illness record-keeping requirements, must file the annual report.

By February 1 every year employers must:

- Review their OSHA 300 log(s);
- Verify that the entries on the 300 log are complete and accurate;
- Correct any deficiencies identified on the 300 log;
- Use the injury data from the 300 log to calculate an annual summary of injuries and illnesses, and complete the 300A annual summary form; and
- Certify the accuracy of the 300 log and the 300A summary form.

The Form 300A is a summation of the workplace injuries and illnesses recorded on the OSHA 300 log during the previous calendar year as well as the total hours worked that year by all employees covered by the OSHA 300 log.

5 common 300A mistakes

We frequently see employers make the following five mistakes related to their annual duty to prepare, certify, and post the injury and illness record-keeping summary.

(1) **Having the wrong person certify the 300 log and 300A annual summary.** The 300 log and the 300A annual summary form must be "certified" by a "company executive." Specifically, company executives are certifying that they:

- Personally examined the 300A annual summary form;
- Personally examined the OSHA 300 log from which the 300A annual summary was developed; and
- Reasonably believe, based on their knowledge of their company's record-keeping processes, that the 300A annual summary form is correct and complete.

Employers often make the mistake of having the 300A form signed by a management representative who

isn't senior enough at the company to be considered a "company executive." OSHA regulations state that company executives include only the following individuals:

- An owner of the company (if the company is a sole proprietorship or partnership);
- An officer of the corporation;
- The highest-ranking company official working at the establishment; or
- The immediate supervisor of the highest-ranking company official working at the establishment.

(2) **Failing to post the 300A annual summary.** OSHA's record-keeping regulations require that after certifying the 300A annual summary, employers must post the certified copy of the form in the workplace location where employee notices are usually posted. The 300A summary must be displayed for three months, through April 30.

Employers commonly fail to prepare or post a 300A form for years in which there were no recordable injuries or illnesses at their establishment. OSHA regulations require employers to complete the 300A form even when there have been no recordable injuries, entering zeroes in each column total, and post the 300A as they normally would.

(3) **Not maintaining a copy of the 300A for five years.** After the certified 300A annual summary has been posted between February 1 and April 30, employers may take the 300A form down but must maintain for five years a copy of the following documentation at the facility covered by the form or at a central location:

- The underlying OSHA 300 log;
- The certified 300A annual summary form; and
- Any corresponding 301 incident report forms.

In this technological age, employers often keep only the electronic version of the 300A form rather than the version that was printed, certified (typically by a handwritten signature), and posted at the facility. As a result, they have no effective way to demonstrate during an OSHA inspection or enforcement action that the 300A form was properly certified.

(4) **Failing to update OSHA injury and illness record-keeping forms.** Another common mistake is putting away old 300 logs and never looking back, even if new information about injuries recorded on those logs comes to light. OSHA's record-keeping regulations require employers to update OSHA 300 logs during the five-year retention period with newly discovered recordable injuries or illnesses or correct previously recorded injuries and illnesses to reflect changes that have occurred in their classification or other details. The requirement applies only to 300 logs—technically, there is no duty to update 300A forms or 301 incident reports.

(5) **Confusing the reporting deadline with the e-recordkeeping rule.** The February 1 deadline is separate and apart from the electronic data submission requirement of OSHA's e-recordkeeping rule. The deadline in 2019 for employers to electronically share data from their 2018 300A forms with OSHA is currently set for March 2, naturally trailing the deadline to prepare the summary data from which the e-recordkeeping submission derives. Note that a few states, including Maryland, Washington, and Wyoming, still haven't adopted the e-recordkeeping rule. Covered establishments in those states technically aren't required to submit data by the March 2 deadline.

Notably, the future of the e-recordkeeping rule in general is uncertain. OSHA issued a Notice of Proposed Rulemaking on July 30 to revise the rule. The proposed rule includes only one significant change to the current regulation—eliminating the requirement for large employers (establishments employing more than 250 workers) to submit the data from their 300 logs and 301 detailed incident reports annually to OSHA. However, the proposal doesn't disturb the mandate that large employers and many smaller employers submit their 300A summary data annually or touch the troubling antiretaliation provisions (e.g., limits on postinjury drug testing and safety incentive programs).

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