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March 26, 2019

Labor & Employment Law Special Briefing

Highlights

- ✔ DOL changing the way it does business
- ✔ OFCCP touting transparency and efficiency
- ✔ OSHA a sleeping giant
- ✔ Tide turns toward employers at NLRB

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By *Pamela Wolf, J.D.*

Agency check-in: 2019 snapshot

Moving into the third year of the Trump Administration, there are some discernable trends among the three federal agencies that are critical to the labor and employment landscape: the Equal Employment Opportunity Commission (EEOC); the Department of Labor (DOL); and the National Labor Relations Board (NLRB). These trends include deregulation, an emphasis more on compliance than enforcement, and employer-friendly policies.

To get a better understanding of these trends and the particular climate at each of the agencies, Wolters Kluwer's *Employment Law Daily* reached out to a team of experts: Brooke Colaizzi, Member, Sherman & Howard; Suzanne L. Martin, Shareholder, Ogletree Deakins; Stephanie Peet, Principal, Jackson Lewis; Connie Bertram, Shareholder, Polsinelli; and Chris Bourgeacq, Founder, The Chris Bourgeacq Law Firm, PC.

A milder EEOC

The temperature at the EEOC can have a huge impact on employment law attorneys, human resource professionals, and employers and employees alike. Over the past year the climate at the EEOC perhaps can best be described as "mild," with little change over the course of the year.

'Quieter' but same focus

Brooke Colaizzi called the compliance environment at the EEOC "quieter." She has seen "less publicity by the EEOC regarding cases and settlements, and more emphasis on seminars and education." Colaizzi also observed that more charges have been processed and investigated by her state (Colorado) equal employment opportunity agency over the last two years. She rarely had clients with a state investigation during the prior 15 years.

As to whether the environment at the agency has changed over the past year, Suzanne Martin said both "yes" and "no." "The EEOC is still focused on previously identified priorities and appears to continue to aggressively pursue systemic discrimination cases," she explained. "The problem is, they are bit hamstrung without a full slate of commissioners, no general counsel, and the government shutdown that created even more of a back-log."

Stephanie Peet registered no real change at the EEOC over the past year.

Enforcement priorities

As for the agency's enforcement priorities, Martin pointed to the EEOC's Strategic Plan for Fiscal Years 2018-2022, while Stephanie Peet cited the

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agency's Strategic Enforcement Plan for Fiscal Years 2017- 2021. Both plans include EEOC enforcement priorities.

Systemic focus. The EEOC has articulated priorities for "combatting and preventing 'employment discrimination through the strategic application of the EEOC's law enforcement authorities,' which upon closer inspection is jargon for conducting systemic investigations and pursuing systemic discrimination lawsuits because these have the most impact," according to Martin.

EEOC maps it out

Jackson Lewis attorney Stephanie Peet noted that the EEOC's Strategic Enforcement Plan (SEP) for Fiscal Years 2017- 2021 provides insight into the agency's intended focus, objectives, and enforcement priorities. According to the SEP, the EEOC's substantive area priorities include:

- **Eliminating barriers in recruitment and hiring.** The EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).
- **Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination.** The EEOC will focus on job segregation, harassment, trafficking, pay, retaliation, and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. These workers are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. Their work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies.
- Addressing selected emerging and developing issues, including, (a) **Qualification standards and inflexible leave policies that discriminate against individuals with disabilities** (cracking down on so-called "100 percent healed" policies that require an employee returning from medical leave to be fully recovered and to work without any restrictions); (b) **Accommodating pregnancy-related limitations** under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); (c) **Protecting lesbians, gay men, bisexuals, and transgender (LGBT) people from discrimination** based on sex; (d) Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and (e) a focus on backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups, as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities.
- **Ensuring equal pay protections for all workers.**
- **Preserving access to the legal system.** Specifically, the EEOC will focus on: (1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with the EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); (2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and (3) **significant retaliatory practices** that effectively dissuade others in the workplace from exercising their rights. For example, firing a senior director who reports a pattern of discrimination at the workplace sends a strong message to others not to complain about or report discrimination.
- **Preventing systemic harassment.** The EEOC received more sexual harassment charges in FY 2018 than FY 2017, and it filed more sexual harassment lawsuits on behalf of aggrieved workers. The agency has put a huge emphasis on anti-harassment efforts and is focusing on both harassment-prevention training and enforcement of antidiscrimination laws.
- **#MeToo.** The EEOC filed 41 lawsuits accusing employers of sexual harassment in FY 2018, which was 50 percent more than it had filed the year before. The agency also fielded more than 7,600 sexual harassment charges, which marked another major uptick.

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Education and outreach. Martin cited several other priorities, including continuing education and outreach programs, which the agency is broadening to include the use of social media, and targeting what the EEOC deems as "vulnerable workers and underserved communities."

Other important priorities. Martin also noted agency priorities for:

- A continued focus on E-RACE (intended to ensure workplaces are free of race and color discrimination), LEAD (Leadership for Employment of Americans with Disabilities) in federal government, and Youth at Work (educating younger workers about their employment rights);
- The Sexual Harassment Task Force that was initiated in 2016 and reconvened in 2018;
- Attacking employer policies that disparately impact disabled employees; and
- Advancing LGTBQ rights as protected by Title VII's prohibition on sex discrimination and sex stereotyping.

2017-2018 strategic initiatives. Colaizzi cited the agency's strategic initiatives for 2017 to 2021 including (1) eliminating barriers in recruitment and hiring; (2) vulnerable workers; (3) equal pay; (4) pregnancy discrimination and accommodation; (5) LGBTQ issues; (6) misclassification and similar issues; (7) religious discrimination and harassment; and (8) systemic harassment.

Biggest concerns. Underscoring the ones she is focused on, Colaizzi said, "From a practical perspective, my biggest concerns and the ones I bring to my clients' attention are LGBTQ issues, equal pay, and sexual harassment in the wake of the #MeToo movement. At least in my district these issues are most likely to grab the EEOC's attention."

No quorum

Currently, the EEOC's five-member Commission includes only the Acting Chair, Victoria Lipnic, and one Commissioner, Charlotte Burrows. President Trump has nominated Janet Dhillon for a spot as Commissioner; she was approved by the Senate Health, Education, Labor, and Pensions Committee on February 27. Her nomination has moved to the Senate floor for potential confirmation.

Notably, in December 2017, President Trump nominated then-Commissioner Chai Feldblum for a third term to expire on July 1, 2023, but her nomination never moved beyond committee assignment. Senator Mike Lee (R-Utah) is said to have blocked the nomination. Feldblum ultimately withdrew her nomination and has joined Morgan, Lewis & Bockius LLP.

Until Dhillon (or a new nominee) is confirmed, the EEOC is left without a quorum. How WILL this lack of quorum impact the agency?

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> *"The lack of a quorum primarily affects lawsuits involving significant expense or significant policy change or novel legal issues, and rulemaking"*
>
> *— Sherman & Howard attorney Brooke Colaizzi*

"Big ticket" suits, policy and rulemaking stalled. "The lack of a quorum primarily affects lawsuits involving significant expense or significant policy change or novel legal issues, and rulemaking," according to Colaizzi. "However, the general work slowdown could also affect the EEOC's ability to put out policy guidance, which while it does not have the force of law, is extremely revealing for employers in terms of evaluating risks associated with their actions."

Peet expressed similar concerns, noting, "The EEOC needs a quorum of three Commissioners to issue new policies, guidance, or regulations." She observed that the EEOC has been reported to be very close to issuing new anti-harassment guidance. "That guidance is on hold until there are three Commissioners at the EEOC," Peet said.

Peet cited other actions by the EEOC that require a Commission vote, such as ruling on a respondent's petition to revoke an EEOC subpoena. She added that decisions on "big ticket" lawsuits, significant spending, and other policy decisions generally can't be made without a quorum of at least three Commissioners. "Major litigation matters that may involve a significant expenditure of funds, generate significant public

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interest or controversy, and present novel issues of law also will be shelved until Commissioners can vote accordingly."

Martin, who noted that the EEOC is also without a General Counsel, said that technically, the EEOC "cannot make decisions on what they would describe as 'big ticket' cases, large expenditures, or policy decisions or regulations." She, too, observed that the Commission has "delegated some decision-making authority to heads of offices, e.g., for litigation, but decisions that affect the agency at large, policy, and regulation issues are stalled."

Notably, President Trump nominated Sharon Fast Gustafson to serve as General Counsel, but her nomination has not yet moved out of committee.

Everyday matters continue. For the most part, though, the agency is still able to handle its day-to-day business. "Even without a quorum, the EEOC can pretty much handle everything that matters to charging parties and respondents," according to Peet. "Litigation authority has been delegated to the local offices. By regulation, EEOC district directors have authority to issue reasonable cause findings and dismiss charges. Thus, many of the commission's day-to-day voting will fall to heads of offices, such as the head of the Office of Federal Operations, who will decide the Commission's stance in federal-sector cases. Decisions on petitions to revoke or modify subpoenas will fall to the head of the Office of Field Programs, and decisions on large contracts will go to the chief operating officer."

Tough compliance issues

Some compliance issues are harder than others for employers to address, so our experts weighed in on which are the toughest ones for employers to keep in mind.

Cutting-edge issues. Colaizzi stressed that the EEOC is often on the cutting edge of legal interpretations that stretch the current boundaries of existing statutory and case law. "Employers often have to balance well-established and understood statutory and regulatory interpretation with EEOC guidance that can depart and/or extend previous statutory coverage," she explained. "LGBTQ issues are a prime example, as are 'ban-the-box' initiatives."

Areas of agency strength. Peet ticked off the areas in which the EEOC has been particularly effective:

- Discrimination in hiring cases, especially with regard to age and race discrimination;
- Harassment (especially at larger facilities) based on sex, national origin, and race;
- Medical leave policies that require workers to be 100 percent healthy before they can return to work;
- Americans with Disabilities Act (ADA) accommodation cases where employers fail to make reasonable efforts to find light-work substitutes for employees with disabilities and/or health issues; and
- Cases involving equal access to leave and leave accommodations (as discussed in the EEOC's May 2016 ADA Leave publication).

Equal pay not so much. In contrast to the areas discussed above, the EEOC has been making a lot of promises and announcements about targeting equal pay violations, but very little has actually been accomplished, according Peet. "It appears that this area may be too tricky/complicated/difficult to prove in most cases," she suggested. "Nonetheless, the EEOC claims this is a priority for the agency."

Note that this priority may gain new steam, though, with a ruling from a federal district court in the District of Columbia on March 4, 2019, that the Commission's revised EEO-1 report, which includes pay data information, previously stayed by the Office of Management and Budget, must be reinstated.

Declaring "illegal" the OMB's stay of the EEOC's pay data collection, the court found that the OMB's deficiencies were substantial and that it was unlikely the government could justify its decision on remand. Vacating the stay, the court granted summary judgment to the plaintiffs in this lawsuit—the National Women's Law Center and the Labor Council for Latin American Advancement—and ordered that the previous approval of the EEOC's revised EEO-1 form "shall be in effect."

Leave policies. Martin observed that for several years, the EEOC has been "very tough on employer leave policies, investigating on a systemic basis whether they adversely impact disabled employees." She cited, for example, policies that provide for no leave during introductory periods, administrative separations if an employee is unable to or fails to return from work after a leave of absence expires, and limited/capped leave of absence policies.

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Others to keep in mind. Martin cautioned that employers should look out for hiring and promotion practices that are not transparent, which may lead to bias. She also pointed to "LGBTQ protections—think dress code policies that might break down appropriate attire for men and women, for example."

Best practices

Colaizzi, Peet, and Martin shared a few best practices for employers that want to avoid EEOC scrutiny. For starters, Colaizzi observed that EEOC guidance itself provides the best resource for employers to understand how the agency will view a particular issue.

Targeted employers and practices. Knowing how the agency views particular types of employers and which issues are on its radar are also key. "Employers also must be aware if they are part of a highly scrutinized industry or if they have a potential or actual charge that falls within one of the EEOC's strategic initiatives or areas of focus," Colaizzi suggested.

Look in the mirror. Martin said that employers should not "throw the baby out with the bathwater" and give up on managing employees, or leaves of absence. "Do make sure you have reviewed your policies and practices; that you have transparent practices or processes for hiring, promotion, discipline, and terminating that are objective; and that you have sophisticated human resources partners who can help you navigate and counsel."

"As appropriate, employers may consider implementing measures to assess the effectiveness of their educational and training programs to ensure that they incorporate current best practices and are appropriately tailored to reflect changes in organizational operations, workforce composition, and application and interpretation of federal and comparable state laws," Peet added.

DOL on the move

The Department of Labor is a cabinet-level federal agency comprised of several sub-agencies. Of these, the Wage and Hour Division (WHD), the Office of Federal Contract Compliance Programs (OFCCP), and the Occupational Safety and Health Administration (OSHA) have perhaps the most significant impact on employer practices and compliance efforts.

WHD less litigious

"The WHD certainly seems to have adopted a more educational and collaborative, and therefore perhaps less litigious, approach under the Trump administration," according to Peet.

Martin noted that the DOL has issued about a dozen opinion letters, "which reflect a more employer-friendly DOL." She added though, "when it comes to investigations, not much has

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Practice Tips

Jackson Lewis attorney Stephanie Peet offered these practice pointers for employers that want to avoid EEOC scrutiny:

- **Take all complaints seriously, conduct and document investigations, and hold people accountable.** Anyone who is found—after a fair and thorough investigation—to have engaged in harassment must receive discipline that is proportionate to the misconduct. HR, supervisors, union stewards and anyone else who is responsible for taking harassment reports must respond appropriately. Additionally, there must be consequences for anyone who retaliates against an employee who reports harassment or intervenes to stop it.
- **Implement and review policies, procedures and training.** Policies and training should be simple and avoid legalese. Employees need to know what behavior is not acceptable in the workplace, what to do if they experience, or observe, unacceptable behavior, what the consequences are of engaging in such behavior, and that retaliation against employees who report harassment will not be tolerated.
- **Review handbooks and medical leave policies and make sure they do not contain 100 percent healthy policies.**
- **Be aware of your hiring policies.** Take note of demographics in your area and consider whether your workforce reflects your community. If not, you may eventually be targeted for improper hiring practices. Multi-state and other large employers and large staffing companies should expect continued scrutiny of recruitment and hiring practices that may disparately impact members of racial or ethnic minority groups, older workers, and persons with disabilities.

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changed;" for example, the agency "is still seeking three years pay or liquidated damages for first offenders in wage and hour audits."

PAID implemented. In March 2018, the DOL announced the Payroll Audit Independent Determination program (PAID), a self-auditing program designed to encourage employers to uncover and voluntarily report potential minimum wage and overtime violations and avoid the risk of penalties or liquidated damages that would be imposed if the agency discovered the violations in the first instance.

PAID began with a six-month trial program in April 2018; in October 2018, the WHD extended the trial period an additional six months, Peet explained. In August 2018, the DOL created a new Office of Compliance Initiatives (OCI) and, as part of this compliance initiative, launched two new websites to provide employers with resources to better assess wage and hour compliance in their workplaces, and to provide employees with information regarding their rights and responsibilities under federal wage and hour law.

New websites launched. Those websites are, Peet pointed out, aptly named, employer.gov and worker.gov, respectively. The stated purpose of the OCI, according to the DOL's website, is to "promote greater understanding of federal labor laws and regulations, allowing job creators to prevent violations and protect Americans' wages, workplace safety and health, retirement security, and other rights and benefits."

Martin, too, saw as a significant worker.gov and employer.gov, which she said were "designed for the audiences their titles espouse, and with an eye towards providing audience specific compliance-related information."

The enforcement scene

As to the WHD's current enforcement priorities, Martin said that on its face, the agency appears to have backed off joint employer and independent contractor misclassification/classification issues with the withdrawal of agency interpretation letters, even though the WHD claimed that doing so did not soften its stance. "Priorities remain compliance, back wage recovery, and focusing on visa program abuse, discrimination, and promoting hiring of military veterans," she observed.

Strategic Plan priorities. Peet noted that in its FY 2018-FY 2022 Strategic Plan, the Secretary of Labor began by touting the plan as "reflecting President Donald Trump's top priorities: jobs, more jobs, and even more jobs," primarily through developing programs to increase apprenticeship opportunities in the U.S.

"In general terms, the DOL listed as its priorities to 'increase employment opportunities for Americans of all abilities; enforce safe and healthy workplaces; bring commonsense to regulations; and use our resources efficiently and effectively,'" Peet said.

"As a further demonstration of the more-educational, and less litigious approach, the Strategic Plan lists as a top priority of the WHD the modernization of 'compliance assistance,'" Peet continued. The specifics, however, she said are less forthcoming.

"Instead, the DOL states generally that it will 'use[] a multi-pronged approach to improve compliance, including investigations in high-violation industries, engagement and education of private and public stakeholders, and the use of communications tools and compliance assistance,' and to this end, the Division 'must conduct its business smarter and more effectively by assessing existing evidence determining how to best achieve its goals,'" Peet explained.

For FY 2019, the WHD requested about $5 million more than the previous year, but more than $4 million of that was for compliance assistance, which Peet characterized as a further reflection of the agency's move away from litigation as the primary enforcement tool.

Continued focus on misclassification. In addition to citing the PAID program, Colaizzi stressed that it encourages employers to self-audit and self-report wage and hour violations, and she also underscored misclassification as an important area for the agency. "The WHD continues to focus on misclassification issues and has agreements with multiple state agencies to combat misclassification," she observed.

H-2B visas. In addition, Colaizzi noted that 2019 saw a significant increase in the number of H-2B (temporary, non-agriculture) visas available and that the allotment has already been filled.

Indeed, due to a tremendous increase in volume—in January 2018 the number of applications exceeded the semi-annual allotment

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by nearly 300 percent—the DOL's Office of Foreign Labor Certification (OFLC) announced on February 26, 2019, that it is updating its application processing procedures. The electronic filing system became unresponsive when about 30 times as many users as in the previous year tried to log on.

All about the rules and regs

Of course, one of the most important things that employers focus on when thinking about compliance are recent regulatory changes and those that are currently in the works, as well as implementing the agency's interpretation of those regulations. Peet counted three significant regulatory developments that occurred recently or are about to occur at the WHD.

Tip credit rules. First, Peet cited the WHD's November 2018 withdrawal of enforcement guidance establishing the "80/20" tip credit rule, under which the Fair Labor Standards Act (FLSA) tip credit was unavailable for tipped employees who spend more than 20 percent of their time performing allegedly non-tip-generating duties.

"The 80/20 rule had fueled numerous, often collective action, lawsuits throughout the country," Peet explained. "Employers, particularly those in the restaurant and hospitality industries, were forced to recreate, minute by minute, the daily activities of their tipped employees and separate them into 'tip-generating' duties, 'related, but non-tip-generating' duties, and 'unrelated' duties, with little guidance on what activities fell into which bucket and how to capture such time."

The DOL has now eliminated that enforcement guidance, Peet said, and in its place, "has set forth specific sources on which employers now may rely to determine whether an employee's duties are sufficiently 'tip-related' to allow the employer to take the tip credit."

New FAB. On February 15, the WHD issued a new Field Assistance Bulletin (FAB) No. 2019-2 that explains, consistent with Opinion Letter FLSA2018-27, issued November 8, 2018, that the WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that is performed contemporaneously with direct customer-service duties, or for a reasonable time immediately before or after performing such direct-service duties.

The WHD said that its staff will consult the Occupational Information Network (O*NET) and 29 CFR 531.56(e) to determine whether duties are related or unrelated to the tip-producing occupation. Duties will be considered related to the tipped occupation when listed as "core" or "supplemental" under the "Tasks" section of the "Details" tab for the appropriate tip-producing occupation in O*NET.

> *"The 80/20 rule had fueled numerous, often collective action lawsuits throughout the country."*
>
> *— Jackson Lewis attorney Stephanie Peet*

The revised Field Operations Handbook (FOH) specifically cites the core tasks listed for waiters and waitresses in O*NET, which include: "cleaning tables or counters after patrons have finished dining; preparing tables for meals, which encompasses setting up items such as linens, silverware, and glassware; and stocking service areas with supplies such as coffee, food, tableware, and linens. In addition, O*NET lists garnishing and decorating dishes in preparation for serving as a supplemental task for waiters and waitresses."

Thus, under the WHD's revised FOH Section 30d00(f), employers are permitted to take a tip credit for any amount of time tipped wait staff spends performing these "related duties."

New overtime rule anticipated. The second regulatory development Peet saw as significant when she initially spoke with *Employment Law Daily* in February is the DOL's highly anticipated new overtime rule, establishing the minimum salary threshold for the "white collar" (executive, administrative and professional) exemptions. "This rule will take the place of the now-invalidated Obama-era rule, under which

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the minimum salary for the exemptions was scheduled to be more than twice the current rate of $23,660, established in 2004," she explained.

At the time, Peet said "We anticipate that the new minimum salary threshold will be in the low-$30,000 range," noting also that, "as with the Obama-era rule, the new overtime rule certainly may be challenged in the courts."

Colaizzi, too, saw as one "biggest issues" the white collar exemptions and whether the salary requirement or any aspect of the duties tests will finally change, as well as other tweaks to overtime compensation rules. She noted that a notice of proposed rulemaking is expected this year, possibly in the first quarter.

This regulatory development was also on Martin's list of top contenders. She noted that the rulemaking had been pushed to March 2019.

Regular rate calculations. Peet also pointed to the DOL's stated intention to issue new guidance on the calculation of the "regular rate" under the FLSA. "Generally speaking, the regular rate is, with a limited number of exceptions, a non-exempt employee's hourly pay rate, based on all compensation received during a given workweek divided by the number of hours worked during that week," Peet noted.

The regular rate is the basis for calculating how much overtime pay to which the employee is entitled. "Determining what compensation must, and need not, be included in the regular rate calculation can be confusing and routinely leads employers to underpaying overtime pay," according to Peet.

Proposed OT rule

It turns out that Jackson Lewis attorney Stephanie Peet's February prediction as to the threshold requirement for overtime pay in the new overtime rule (the low-$30,000 range) was very close to the mark. On March 8, the DOL released its proposed overtime rule setting a salary threshold at $35,308 per year.

Notably, there are no proposed changes to the job duties test.

Salary threshold boost. Under the current rule, employees with a salary below $455 per week ($23,660 annually) must be paid overtime if they work more than 40 hours per week, a salary level that was set in 2004. The newly proposed rule would update the salary threshold using current wage data, projected to January 1, 2020. The result would boost the standard salary level from $455 to $679 per week (equivalent to $35,308 per year). Above this salary level, eligibility for overtime varies based on job duties.

The DOL estimates that 1.1 million currently exempt employees who earn at least $455 per week but less than the proposed standard salary level of $679 per week would become eligible for overtime (without some intervening action by their employers, such as raising their salary).

The increase in the salary threshold, while steep, falls far short of the Obama DOL's failed 2016 final rule, which more than doubled the floor to $50,440 (and would have made an estimated 4.2 to 5 million more workers eligible for overtime).

"Highly compensated employees." The proposal also would increase the total annual compensation requirement for "highly compensated employees" (HCE) from the currently enforced level of $100,000 to $147,414 per year. Above this salary floor, employees are *automatically exempt* from overtime.

The Department estimates that an additional 201,100 workers who earn at least $100,000 but less than $147,414 per year, and who meet the minimal HCE duties test but not the standard duties test, would become eligible for overtime under the rule change.

Counting bonuses. "In an attempt to align the regulations better with modern pay practices," according to the rulemaking notice, employers would be allowed to use nondiscretionary bonuses (such as nondiscretionary incentive bonuses tied to productivity and profitability) and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level. (The 10-percent cap appeared in the 2016 final rule as well.) The DOL is inviting comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

There is no change to the use of bonuses for purposes of establishing the highly compensated employee salary floor, however.

Periodic adjustment. The proposal does *not* call for automatic adjustments to the salary threshold, but the rule does commit to *periodic review* to update the salary threshold. The DOL is seeking comments on the proposal's language for periodic review. Any update would continue to require notice-and-comment rulemaking.

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Other potential changes. Martin also included the desire to address joint employment regulations, and proposals to change the basic and regular rate requirements, to facilitate flexibility for employers in how they design compensation and pay employees, as at the top of her list of important anticipated regulatory developments.

Colaizzi, too, pointed to a push for regulations to clarify the joint-employment issue.

Tricky compliance issues

Peet, Colaizzi, and Martin also weighed in with what they see as the "trickiest" compliance issues at the WHD.

Regular rate and hours worked. Peet reiterated that proper calculation of the "regular rate," and the related concept of what constitutes "hours worked" under the FLSA, are recurring issues with which employers struggle. "Moreover, with the routine availability of smart phones and other communication technology—the use of which employers often mandate—accurately tracking and recording hours worked by non-exempt employees and prohibiting off-the-clock work continue to be problematic," she said. "If a manager emails, or leaves a voice mail for, an employee at any hour of the day or night, and expects a prompt response to that communication, that employee is now working," she explained.

"Along the same lines, cloud computing and virtual private networks (VPNs) have made telecommuting more practical for a wider array of jobs, which in turn can make it more difficult to determine when employees truly are, or are not, working, further exacerbating the problem of accurate timekeeping," Peet added.

Employee misclassification. Misclassifying employees as exempt (*i.e.* not entitled to overtime) is another common FLSA compliance issue, according to Peet. "Misclassification is one of the most common bases of class and collective action lawsuits filed against employers, because—especially in large organizations—if one employee is misclassified, so likely is every other employee in that job and, perhaps, others in similar jobs," she observed. "The result, then, can be a prohibitively expensive lawsuit to defend and/or settle, with the prospect of a very large verdict looming."

Martin, too, sees properly classifying employees as exempt and non-exempt, and thus, paying overtime, as an important compliance issue.

"I would argue that WHD compliance is tricky all the time," said Colaizzi. "The overtime and exemption rules created havoc in 2016 as many employers prepared for change, only to have the rules pulled right before implementation. New rules will result in substantial changes for many workplaces."

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> *"Although I would not necessarily recommend the PAID program, at least in all circumstances, self-audits are very important to help maintain compliance with wage and hour laws."*
>
> *— Sherman & Howard attorney Brooke Colaizzi*

FMLA management. Martin also pointed to properly managing the FMLA as a tricky compliance issue.

Practice pointers

What best practices do our experts recommend to avoid some of the most common compliance pitfalls related to the WHD? "As with all things employment-law related, complete and accurate recordkeeping is vital," according to Peet. "In fact, in many states, failure to properly maintain payroll records containing required information can itself result in a separate violation of the law."

Overtime exempt assessment. Peet also recommended that employers "undertake—preferably with the assistance of experienced legal counsel and/or human resources professionals—a thorough assessment of every position they have classified as overtime-exempt, to ensure compliance not only with the FLSA but with the laws of any states in which they operate."

She said this review is particularly important in light of the DOL's proposed overtime rule and corresponding changes in the minimum salary

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threshold. "Notably, a number of states have their own statutes or regulations with different, and sometimes more stringent, duty requirements for overtime exemptions," Peet observed.

Echoing this best practice tip, Martin said, "Do a payroll audit, and ask tough questions about whether people are properly classified as exempt and non-exempt."

Self-audits are important. In the same vein, Colaizzi suggested: "Although I would not necessarily recommend the PAID program, at least in all circumstances, self-audits are very important to help maintain compliance with wage and hour laws."

FMLA requests. As to FMLA compliance, Martin advised employers to "Make sure [that] if you are covered by the FMLA, you have someone who is responsible for managing those requests, and the documentation, and train your managers to take all medical or sick or personal time off requests to HR."

New OFCCP directives

Jackson Lewis attorney Stephanie Peet pointed to several new directives issued by the OFCCP:

- Provisions requiring all OFCCP offices to issue a Predetermination Notice (PDN) prior to issuing a Notice of Violations (NOV) alleging individual or systemic discrimination;
- A plan to commence "focused reviews" as to each of the three authorities that the OFCCP enforces—Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), and Section 503 of the Rehabilitation Act;
- A new Compensation Directive providing greater insight into how the agency analyzes compensation data;
- The establishment of contractor recognition programs;
- The planned implementation of an Ombud Service to facilitate fair and equitable resolution of specific types of issues that may arise during audits;
- Early audit resolution procedures;
- The planned issuance of opinion letters similar to those issued by the WHD; and
- A verification procedure to ensure contractors are preparing affirmative action plans on an annual basis.

OFCCP changing its footprint

The compliance environment at the OFCCP has changed over the past year, according to Peet, who noted that under the leadership of the agency's new director, Craig Leen, the OFCCP has issued "a slew of new directives" in the past year or so, reflecting its stated goal of providing greater transparency and consistency in its enforcement activities.

What can contractors expect?

Polsinelli's Connie Bertram also observed that the OFCCP has issued a series of directives that she said were part of "a broader effort to 'increase transparency of preliminary findings with federal contractors, and to achieve consistency across regional and district offices.'" The OFCCP has clearly been making an effort to take some of the mystery out of dealing with and preparing to deal with the agency. Bertram singled out a new publication issued by the OFCCP on August 2, 2018: "What Contractors Can Expect." It provides an overview of anticipated changes, with stated expectations that include:

- ***Access to accurate compliance assistance material***—Materials will be provided in the form of "technical assistance guides, factsheets and brochures, 'FAQs', guidance documents, directives, webinars, and email."
- ***Timely responses to compliance assistance questions***—Contractors can typically expect a reply to Help Desk inquiries and emailed compliance assistance questions within 3-4 business days.
- ***Opportunities to provide meaningful feedback and to collaborate***—Contractors will be able to submit feedback on the quality and quantity of the agency's compliance assistance offerings and, periodically, on their experiences during their most recent compliance evaluations.
- ***Professional conduct by the OFCCP's compliance staff***—Contractors "can expect to receive prompt, courteous, and accurate information during compliance evaluations and complaint investigations."
- ***Neutral scheduling of compliance evaluations***—the OFCCP will not schedule a contractor for a compliance evaluation because it sought compliance assistance.
- ***Reasonable opportunity to discuss compliance evaluation concerns***—Contractors "can expect to have a reasonable opportunity to discuss issues

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that may affect the progress or results of their compliance evaluation or complaint investigation."

- ***Timely and efficient progress of compliance evaluation***—Contractors should expect that when asked for information they will be provided with "reasonable production timelines ... as determined in light of all relevant facts and circumstances."
- ***Confidentiality***—Contractors "can expect that the information they provide during a compliance evaluation will be kept confidential."

Opinion letters and help desk. Bertram also noted that as part of this effort, on November 30, 2018, the OFCCP issued the Opinion Letters and Desk Help Directive (2019-03), which will implement a help desk to answer contractor questions and an opinion letter program similar to that in place with the Department of Labor's Wage and Hour division.

Enforcement focus

It's important that government contractors know what particular issues the agency has on its radar. According to Colaizzi, "the OFCCP is focusing on a number of priorities including workplace inclusion and compensation compliance, religious exemptions so that religious organizations can obtain more government work, and continued efforts to minimize the affirmative action obligations of TRICARE subcontractors."

Message from the top. Peet noted that Acting OFCCP Director Craig Leen has testified as to the agency's priorities for 2019 and shared his vision for 2019 and beyond. "The agency will work with the General Services Agency to require contractors to annually certify that they have updated their [Affirmative Action Plans (AAPs)]," Peet said.

"Leen also testified that the agency will commence with focused reviews, starting with contractor adherence to the affirmative action regulations governing individuals with disabilities. Leen shared his plans to increase the number of audits performed by the agency considerably in 2019—from fewer than 1,000 to around 3,500 annually."

Peet added that the OFCCP "continues to focus on investigation of systemic compensation discrimination and failure to hire issues."

Priority roadmap. Bertram broke the agency's top enforcement concerns down a little further. "The OFCCP will continue to focus on systemic compensation discrimination, and will seek to conduct more desk audits of a larger number of contractors, as opposed to conducting full reviews of a smaller number," she said.

Also echoing Leen's comments, Bertram observed that on August 2, 2018, during an impassioned speech at the National Industry Liaison Group's annual conference in Anaheim, California, the OFCCP Acting Director commented that the agency will continue to focus on systemic compensation discrimination, particularly with regard to race and gender, and that the agency will bring back "focused reviews."

"The OFCCP will continue to focus on systemic compensation discrimination, and will seek to conduct more desk audits of a larger number of contractors, as opposed to conducting full reviews of a smaller number."

— Posinelli attorney Connie Bertram

Governing law compliance. The Polsinelli attorney noted that a week later, on August 10, 2018, the OFCCP issued Directive 2018-04, instructing that a portion of the OFCCP's scheduling lists include focused reviews on compliance with the three laws enforced by the OFCCP:

- Executive Order 11246 (equal employment opportunity regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin);
- Section 503 of the Rehabilitation Act (equal employment for individuals with disabilities); and
- VEVRAA (equal employment for protected veterans).

Religious exercise. Turning to the issue of religious exercise, Bertram noted that also on August 10, 2018, Leen issued Directive 2018-03 "in an effort to harmonize OFCCP's standards

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with 'recent developments in the law regarding religion-exercising organizations and individuals.'"

"The directive provides a summary of the OFCCP's regulations, executive orders, and court decisions addressing the standards that apply to religious organizations and claims of discrimination based on religious affiliation, noting the duty to 'protect religious exercise—and not to impede it," Bertram explained. "At the end of the directive, it instructs OFCCP staff 'to take these legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246,'" she added.

ACE program nixed. Finally, Bertram noted that on November 30, 2018, the OFCCP also issued Directive 2019-01, which ended the Active Case Enforcement (ACE) program. This directive requires OFCCP staff to conduct compliance evaluations according to the Federal Contractor Compliance Manual and the supplemental guidance that the agency has issued, she said. "These new Compliance Review Procedures seek to improve the efficiency of audits and increase the number of audits, and early proactive corrections to resolve non-material violations," Bertram explained.

Regulatory changes

What are the most important things that employers need to know about the regulatory changes that either have already been made, or are in the works at the OFCCP? For starters, Peet cautioned: "The OFCCP's planned AAP preparation verification process creates heightened risks for contractors that choose not to prepare their affirmative action programs annually as required by the regulations."

"Due to the commencement of focused reviews, contractors should ensure more than ever their compliance with their obligations under VEVRAA and Section 503 of the Rehabilitation Act," Peet continued.

Finally, Peet observed: "Under the new Compensation Directive, the agency has reinforced its commitment to root out systemic compensation discrimination. Accordingly, contractors should consider the implementation of proactive, privileged, internal pay equity audits."

Directives add, delete programs. Bertram said that in the last year, the OFCCP has issued a flurry of new directives, enacting new programs and ending others. She walked through some of those changes:

Early resolution. "On November 30, 2018, through Directive 2019-02, the OFCCP announced that it was adopting Early Resolution Procedures, which provide a mechanism for undertaking a mini-audit focused on specific technical violations or findings of discrimination uncovered during the initial desk audit phase," Bertram noted.

Under this directive, after the desk audit (for technical violations) or a truncated on-site visit (for potential findings of discrimination), the OFCCP would propose an Early Resolution Conciliation Agreement (ERCA) that would resolve the violation at both the establishment under audit and at other establishments of the contractor covered by the ERCA, she explained. The OFCCP would not issue an NOV if the OFCCP and the contractor entered into an ERCA.

Voluntary enterprise-wide review. Pointing to another new program, Bertram noted that on February 13, 2019, through Directive 2019-04, the OFCCP also announced that it would be implementing a new Voluntary Enterprise-Wide Review Program (VERP). She said this directive provides "the framework" of what federal contractors can expect:

- The OFCCP will conduct compliance reviews of the contractor's headquarters location as well as a sample or subset of establishments.
- Contractors will be required to demonstrate that they meet established criteria showing not only basic compliance with the OFCCP's requirements, but also a demonstrated commitment to and application of successful equal employment opportunity programs on a corporate-wide basis.
- Contractors that are found to be OFCCP-compliant will be removed from the OFCCP's list for random compliance evaluations for a period of three years. Top-performing contractors with model corporate-wide diversity and inclusion programs will receive five years of relief from random compliance evaluations.

Bertram noted however that the details concerning this program have not been released by the OFCCP.

Ombud Service. Through Directive 2018-09, the OFCCP has also adopted an Ombud Service in the National Office "to facilitate the resolution

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of concerns raised by external stakeholders, including federal contractors and subcontractors, industry groups, law firms, and complainants." This directive explains that "transparency is the foundation of a relationship of respect, dialogue and feedback with its stakeholders that will help the agency improve its effectiveness in both compliance assistance and evaluations."

"The OFCCP believes that increased transparency will improve operational efficiency and effectiveness and support contractors' ability to conduct meaningful self-audits that proactively identify and address areas of concern," according to Bertram.

FAAP Program. There are also potential changes in the works to the Functional Affirmative Action Program (FAAP), under which federal supply and service contractors may develop AAPs based on a business function or business unit, rather than on contractor establishments.

Bertram pointed out that the OFCCP has recently proposed a new directive. "The proposed reforms include a number of changes that will make the program more attractive to contractors that are organized by functions or lines of service," she said. "The proposed revisions would decrease the burdens imposed by FAAP agreements and provide more consistent application of the OFCCP's approval process, audit selection process, and audit procedures."

Town hall meetings. The final change that Bertram underscored was the two town hall meetings that the OFCCP held in February 2019 to provide compliance assistance to federal government contractors in the tech industry. The agency will likely hold additional such meetings throughout the year.

Wrestling with compliance issues

Some compliance issues are more difficult than others for employers to tackle. Our experts weighed in with some of these "tough" compliance issues.

Compensation. "Compensation compliance is one of the trickiest areas," according to Peet. "One issue is that the agency has shown a tendency to aggregate or cluster groups of employees with different job titles, salary ranges, job groups, and even EEO-1 codes for the purpose of increasing the pool size for multiple regression analysis," she explained. "Although the law requires that pools for compensation analysis consist of 'similarly situated' employees, the OFCCP's aggregations can result in pools of employees who are wholly dissimilar—e.g., including legal clerks with attorneys. Predicting the employees the OFCCP will aggregate for the purpose of analysis can be difficult or impossible."

Subcontractors. As Colaizzi sees it, subcontractor compliance is a difficult issue. "It can be a difficult analysis to determine whether a subcontractor is covered," she said.

Applicant-to-hire disparities. Bertram noted three areas that can be tough for employers to wrestle with. "In recent years, contractors have faced the most significant liability based on applicant-to-hire disparities," she said. And even with all of the initiatives of the OFCCP, she saw no indication that this will change.

"We have found that the vendors and firms retained by contractors often are not conducting hiring, promotion, and termination analyses to detect and possibly correct disparities," she explained. "In addition, many contractors are not properly refining their applicant pools to limit them to Internet applicants—i.e., candidates who express interest in an open position and meet the basic qualifications."

Pay equity. Bertram cited pay equity as another significant challenge for contractors. She noted that the OFCCP recently issued a directive refining the standards that the agency will use in conducting compensation audits. "The directive includes a number of technical rules that are not consistent with traditional pay equity reviews conducted by employers," she stressed.

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> *"The OFCCP believes that increased transparency will improve operational efficiency and effectiveness and support contractors' ability to conduct meaningful self-audits that proactively identify and address areas of concern."*
>
> *— Polsinelli attorney Connie Bertram*

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"Contractors should retain qualified counsel and statistical experts to review their compensation policies and practices and to undertake a statistical analysis consistent with the directive," Bertram suggested. "Many contractors have refined their compensation policies and the structure of their AAPs so that compensation analyses can be conducted consistent with the new directive."

Periodic self-audits. Finally, Bertram observed that the OFCCP expects contractors to engage in periodic self-audits to determine whether they are making progress towards their goals and to identify and correct problem areas, such as applicant-to-hire disparities. "Contractors need to develop protocols and work streams for undertaking effective self-audit procedures," she recommended.

Optimum Practices

For contractors looking for best compliance practices designed to avoid problems with the OFCCP, Polsinelli attorney Connie Bertram offered these tips:

- Prepare an audit-ready AAP with lawyer input and a self-audit program.
- Run disparity analyses on applicants and hires, promotions, and terminations in connection with the preparation of your AAPs.
- Based on the results of the AAP and the disparity analyses, prepare and execute an action plan designed to address the goals and problem areas.
- Through counsel, conduct periodic compensation analyses using Pay Analysis Groupings that comply with the OFCCP directive. Be proactive in addressing pay disparities that cannot be explained through proper compensation factors, such as seniority or geography.
- Use an applicant tracking system to automate the process of identifying true "applicants." Generally, this includes prohibiting the use of "evergreen" requisitions and using disposition codes to eliminate candidates who do not meet the basic qualifications or who withdraw from consideration.
- Confirm compliance with Section 503 of the Rehabilitation Act, particularly now that the OFCCP is conducting focused reviews.
- Do not be reluctant to reach out to the OFCCP for compliance guidance and to form a good relationship with the compliance team in your local district and region offices.

Compensation guidelines. Peet suggested that "contractors should consider establishing clear guidelines on which employees they consider to be similarly situated for compensation purposes." They should also consider strategies such as when it may be appropriate to educate the OFCCP about these compensation guidelines early in the review process, she said.

Contractors should also conduct proactive, privileged internal pay equity audits and make appropriate adjustments before audits occur, according Peet.

Finally, Peet suggested that contractors "run adverse impact analyses (applicant-to-hire, promotions, and termination analyses) and pay equity analyses not only by gender and minority v. nonminority comparisons, but also by individual race comparisons—e.g. White v. Hispanic, White v. Asian, Black v. Asian, etc.

Inexperienced beware! Navigating OFCCP requirements can be really tricky for newcomers. "Subcontractor identification and compliance can be a challenge, particularly for companies that don't necessarily seek out and know about federal contracting," Colaizzi cautioned. "They can easily enter into agreements with clients that make them subject to the regulations, and they don't even know it."

A less aggressive OSHA

There has been a notable difference in the compliance environment at OSHA. Peet cited three trends related to changes at the agency:

- There has been a continued focus on deregulation, but the pace has slowed down.
- 2017 witnessed a dramatic focus on the rollback of Obama-era regulation.
- The post-midterm election U.S. House of Representatives will likely focus more on worker protections.

Still no leadership. As Chris Bourgeacq observed, the agency still remains without a leader, as President Trump's nominee to head OSHA—Scott Mugno—is still awaiting confirmation by the Senate. "Mugno, a corporate executive in the safety field, will likely focus on addressing real, demonstrable safety concerns and ease up on some of the more hypothetical or ideologically driven policies from the previous OSHA administration," he suggested.

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On October 20, 2017, Trump nominated Mugno for the job of Secretary of Labor Occupational Safety. At the time of his initial nomination, Mugno was Vice President for Safety, Sustainability, and Vehicle Maintenance at FedEx Ground in Pittsburgh, Pennsylvania. He is currently retired, according to his LinkedIn profile.

When Mugno's nomination failed to garner approval by the end of the last Congress, Trump re-nominated him. The Senate Health, Education, Labor, and Pensions Committee, which previously gave him a green light in December 2017, approved his nomination again on February 27, 2019.

Fairfax Memo rescinded. "Despite its lack of a permanent leader at the helm, OSHA has taken some actions benefiting employers," Bourgeacq observed. For example, he, pointed to OSHA's rescission in 2017 of the "Fairfax Memo" requiring employers to permit nonemployees, including union officials, to accompany OSHA during inspections, seen by some as a ploy to make union organizing easier.

Safety incentive programs. In 2018, OSHA also modified its whistleblower guidance to make it easier for employers to adopt safety incentive programs and to conduct post-accident drug testing, Bourgeacq continued. "Before then, in another Fairfax memo, OSHA browbeat employers with safety incentive programs and certain drug testing policies, contending those actions retaliated against employees reporting workplace injuries," he explained. Saying the "sanity has returned," Bourgeacq observed that "employers can continue those activities without the fear of constant retaliation claim investigations," citing OSHA's October 11, 2018 Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv).

Electronic reporting. Citing another "big deal" change at OSHA, Bourgeacq singled out the "on-again, off-again deadline" for employers to electronically submit workplace illness and injury information. He characterized the impetus for this Obama-era rule as to, in effect, "publicly shame employers by having their record of on-the-job injuries made public."

The most recent deadline for employer compliance had slid back to March 2, 2019, Bourgeacq noted. "But OSHA recently published a final rule amending the electronic reporting requirements to now apply only to employers having 250 or more employees and to electronically file only information from OSHA Form 300A," he explained. "Current reporting requirements for other employers remain in effect, and the requirement to maintain OSHA Forms 300, 300A, and 301 for five years also remains in effect."

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Top enforcement concerns

Turning to OSHA's enforcement focus, Bourgeacq said the agency has several industry-specific priorities, both in terms of safety standards and targeted inspection activities.

> *"Despite its lack of a permanent leader at the helm, OSHA has taken some actions benefiting employers."*
>
> *— Attorney Chris Bourgeacq (The Chris Bourgeacq Law Firm)*

Industry- and site-specific priorities. Some new safety standards for 2019 affect businesses and employees working around beryllium; users of respirators; and operators of cranes and derricks.

OSHA also has reaffirmed, in a notice on October 1, 2018, its site-specific targeting program for 2019, which continues to target industries—both construction and non-construction—as well as random establishments and employers who fail to submit Form 300A reports, Bourgeacq noted.

Other priorities. Peet cited several current enforcement priorities:

- Improving quality and efficiency of employer electronic injury reports;
- Increasing the number of trenching and excavation hazards abated by 10 percent;
- Pushing Voluntary Protection Programs and internal safety programs, as well as worker health and safety initiatives;
- Requiring companies to document evaluations of their crane operators;

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- Inspections of large employers that do not submit electronic recordkeeping in timely manner (namely 2015 Form 300A data);
- Eight National Emphasis Programs: lead, shipbreaking, trenching/excavations, process safety management, hazardous machinery, hexavalent chromium, primary metal industries, and combustible dust.
- 100 or more Regional and Local Emphasis Programs

From the regulatory agenda. Peet also turned to OSHA's regulatory agenda to cite several priority items, including communication tower safety, emergency response and preparedness, mechanical power press updates, and prevention of workplace violence in health care and social assistance, all of which are in the pre-rule stage.

In the proposed rule stage are these: amendments to the cranes and derricks in construction standard, exposure to beryllium, and the addition of Puerto Rico as a state plan.

Finally, Peet pointed to final regulatory actions on occupational exposure to beryllium in construction and shipyard sectors; crane operator qualifications in construction; rules of agency practice and procedure concerning OSHA access to employee medical records; and tracking of workplace injuries and illnesses.

Drug testing

Jackson Lewis attorney Stephanie Peet stressed the importance of OSHA's position on drug testing. OSHA has found permissible:

- Random drug testing,
- Drug testing unrelated to workplace injury or incident,
- Drug testing under a state workers' compensation law,
- Drug testing under federal law, and
- Drug testing to evaluate the root cause of a workplace incident.

As to post-accident drug testing, Peet noted: "Previous restrictions on post-accident drug testing have been loosened, as OSHA acknowledges that employers/employees have a legitimate interest in knowing whether drug use played a role in a workplace incident."

Earlier restrictions were intended to increase the likelihood of employees filing reports of accidents/incidents (by reducing employees' fear of subsequent drug testing).

Must-know regulatory changes

Bourgeacq and Peet underscored the most important things that employers need to know about recent and upcoming regulatory changes at OSHA.

Citations trending downward. "According to some commentators, inspection activity by OSHA appears to have decreased under President Trump's administration—probably not surprising, but also due in large part to across-the-board hiring freezes affecting OSHA and other federal agencies," Bourgeacq said.

Electronic recordkeeping. Peet pointed to OSHA's January 2019 final rule rescinding portions of the Obama administration's electronic record-keeping rule that required many employers to electronically submit detailed injury reports to OSHA each year (effective on February 25, 2019), echoing Bourgeacq's earlier emphasis on this regulatory action.

Breaking it down a little further, she noted that under the final rule, on or before March 2, 2019, employers with more than 250 employees, and employers with 25-249 employees in certain industries, are required to electronically submit only their OSHA 300A Summary for calendar year 2018. OSHA withdrew the prior requirement that affected employers electronically file their OSHA 300 Logs and OSHA 301 Injury and Illness Incident Reports each year.

"According to OSHA, the value of collecting and processing information from OSHA 300 Logs and 301 Incident Reports is uncertain, while its past experience has shown information from severe injury reports and seeking to use the large volume of data from the OSHA 300A Summary is more useful and efficient," Peet explained. "Employers are still required to maintain physical copies of the OSHA 300 Log, the OSHA 301 Incident Reports and the OSHA 300A Summary on-site and to post a signed copy of the OSHA 300A Summary from February 1 through April 30. OSHA will continue to obtain copies of these documents as needed through the normal inspection and enforcement processes."

Don't miss the deadline! Peet warned that manufacturers, energy and utility companies, trucking and transportation companies, and others should make sure to get 300A Forms filed by the deadline. If they miss the deadline, they should prepare for a comprehensive OSHA inspection, without notice, especially if the company has a history of accidents or injuries.

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Safety incentives. Rate-based incentive programs may be okay under OSHA guidance so long as the program does not discourage reporting accidents/incidents, according to Peet.

Penalty increases. The Jackson Lewis attorney also pointed out that there are increases in employer penalties for safety violations in 2019. Serious violations can result in $13,260 penalties, but repeat "serious" violations can result in up to $132,589 penalties. "Too many citations and penalties can cost company business opportunities and contracts," Peet said, adding that they may not be eligible to bid on projects if they've had too many citations.

What can we expect this year?

As to what rulemaking employers can expect to see at OSHA this year, Peet said employers can look for these regulatory actions:

- Updates to the Hazard Communication Standard, with a notice of proposed rule-making expected in March 2019.
- Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, with the final rule expected in June 2019.
- Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, with the final rule expected in June 2019.

"Additionally, expect OSHA to move forward on reviewing potential standards regarding prevention of workplace violence in health care and social assistance, tree care, and emergency response and preparedness, which are all in the pre-rule stage on OSHA's Fall agenda," Peet said.

Power trucks. Notably, on March 11, 2019, OSHA published a notice that it is considering whether or not to initiate rulemaking to revise the current powered industrial trucks standards for general, maritime, and construction industries. The term "powered industrial truck" includes what are commonly termed forklifts, but the term also includes all fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by an electric motor or an internal combustion engine.

Most challenging

What are the trickiest compliance issues at OSHA? "Keeping track of state OSHA rules in the states that do not simply follow federal OSHA—especially in states like California, where state laws will continue to require electronic reporting of incidents by large employers, despite changes in federal OSHA rules," according to Peet.

Avoiding pitfalls

Bourgeacq and Peet weighed in with some best practices for avoiding some of the most common OSHA compliance pitfalls.

Take citations seriously! "When hit with a citation through an inspection or employee complaint, employers need to take such citations seriously and, if this is a second or subsequent citation, engage legal counsel to handle resolution of the citation," Bourgeacq suggested. "OSHA enforcement is based on an increasing severity of the citation and the consequent penalty, so like a speeding ticket it behooves an employer to get a reduced citation level and penalty to avoid an even larger exposure later."

> *"When hit with a citation through an inspection or employee complaint, employers need to take such citations seriously and, if this is a second or subsequent citation, engage legal counsel to handle resolution of the citation."*
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"I think compliance in many cases requires a very intimate working knowledge of the safety standards at issue, when dealing with safety citations, so you or your client can identify flaws with the citation," Bourgeacq continued. "Familiarize yourself with the defense of 'unpreventable employee misconduct' and take steps, before the citation, to have facts available to prove this defense." Those facts include:

- The employer established work rules to prevent the violation from occurring.
- The employer adequately communicated the work rules to employees.

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- The employer took steps to discover violations of its work rules.
- The employer effectively enforced its safety rules and took disciplinary action when violations were discovered.

Other practice tips. Peet offered these practice tips for employers:

- Seriously focus on training employees
- Post all rules/regulations
- Encourage immediate and accurate reporting of incidents
- Keep good records
- Renew and update safety programs and health programs at work
- Know drug testing rules—both local and federal—especially if the company has offices in multiple states

Employer-friendly NLRB

The compliance environment has shifted at the NLRB. As to how far in the direction of employers it will go remains to be seen.

"We are finally seeing a shift at the NLRB from the hard left back to the center or at least to a more balanced approach in traditional labor matters—albeit at a slower pace than it took for the Obama Board to swing the balance over to 'Big Labor,'" Bourgeacq observed.

Peet expressed similar sentiments: "The compliance environment has continued to shift toward employers, albeit slowly." She noted that at full complement, the Board has five members. "For eight years under President Obama, the NLRB had three union-friendly and two business-friendly members," she explained. "As a result, the NLRB issued numerous union-friendly/pro-employee decisions.

"After the election of President Trump, the NLRB is now dominated by business-friendly members—Chairman John Ring and Members William Emanuel and Marvin Kaplan—who have shown a propensity to vote to overturn union-friendly precedents issued by the 'Obama Board,'" she pointed out.

Peet also noted that there is currently one vacancy on the Board that ordinarily would go to an employee-friendly member.

"In addition, the NLRB's new Trump-appointed General Counsel—its chief prosecutor—is business-friendly, unlike his Obama-appointed predecessor," Peet added.

Important changes

There are several important changes at the NLRB that employers should keep in mind in terms of compliance. Bourgeacq underscored two of these.

Employer handbooks. "First, the era that every employer handbook is potentially unlawful and violates the National Labor Relations Act (NLRA) finally is over," he said. In late 2017, the Board issued its *Boeing* decision, creating a three-category framework for determining the lawfulness of work rules, he explained.

"Category 1" includes work rules the Board specifically designates as lawful; "Category 2" includes rules which require individualized scrutiny to see if the rule interferes with rights under Section 7 of the NLRA; and "Category 3," which covers rules that are essentially *per se* unlawful under well-settled law, such as a ban on employees discussing wages or benefits with each other.

"Providing some well-needed elaboration on these three categories, the Board's General Counsel in June 2018 issued a memorandum providing employers detailed guidance and examples on handbook rules and in which categories they would likely fall from the Board's perspective," Bourgeacq continued. "Employers and their attorneys would be well-served to review this memo when reviewing or creating employee handbooks," he said.

Deferrals. As to the second major development, Bourgeacq observed that "deferral to the grievance and arbitration process is back in vogue again." Late last year, the Board's General Counsel "reinvigorated deferral to grievance and arbitration as a preferred approach to resolving labor disputes."

"In GC Memo 19-03 (December 28, 2018), the General Counsel reversed an 'Obama Board' practice that enabled unions to force employers to defend labor disputes simultaneously in two forums—at the NLRB and under the parties' grievance/arbitration process," Bourgeacq continued. "Now, the current General Counsel has signaled employers and unions that if they have a grievance and arbitration procedure in place and a pending grievance over the dispute at issue in the Board charge, charges that are amenable to arbitration no longer have to be fully investigated early by the Board. Instead, charged parties can

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now point to the grievance/arbitration process and to any pending grievance to get the charge deferred and slowed down a bit."

"By rescinding its previous, unduly restricted approach to deferral, the Board's General Counsel has saved employers considerable expense avoiding, in effect, trying [their] case during the investigation stage," according to Bourgeacq.

Notable NLRB actions. Noting that both the NLRB and the General Counsel play a role in the compliance environment at the Labor Board, Peet denoted several NLRB developments over the past year.

Independent contractors. In its January 25, 2019, ruling in *SuperShuttle DFW, Inc.*, the Board issued a business-friendly decision overturning an Obama Board precedent regarding the test for determining when an individual is an independent contractor or employee.

"Quickie election" rules. The Board has also reviewed responses to its December 13, 2017, Request for Information (RFI) regarding the Obama Board's representation case rules. "The RFI sought input on whether the 2014 amendments to the NLRB's representation case procedures, promulgated by the Obama Board, that reduced the opportunities for employers to communicate with their employees about union issues between the filing of a representation petition and the NLRB-conducted election, should be retained, modified, or rescinded," Peet explained.

Joint-employer standard. The Jackson Lewis attorney also pointed to the Board's proposed rule on its joint-employer standard. The Board collected almost 7000 comments about the proposal, she noted. "Essentially, the proposed rule overturns the Obama Board's union-friendly *Browning-Ferris* standard for determining if two or more companies (such as a contractor and a subcontractor, or a user employer and a supplier [of employees] employer) are joint employers of the subcontractor's/supplier's employees," she explained.

The September 14, 2018, notice of proposed rulemaking "provides that an employer may be found to be a joint-employer of another employer's employees *only* if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine," Peet continued. "Indirect influence and contractual reservations of authority [as held in *Browning-Ferris*] would no longer be sufficient to establish a joint-employer relationship."

Rules and policies. Echoing one of the important developments named by Bourgeacq, Peet also thought important the Board's review of employer rules and policies pursuant to what she called its "December 2017 employer-friendly *Boeing Co*. decision." The ruling overturned the Board's "pro-employee *Lutheran Heritage Village-Livonia* decision, under which many run-of-the-mill employer rules and policies (such as rules/policies requiring employees to act civilly toward one another) were deemed to violate the NLRA," Peet explained. "The NLRB has remanded numerous cases that held various employer rules unlawful for reconsideration by NLRB administrative law judges."

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>
> *— Jackson Lewis attorney Stephanie Peet*

Arbitration waivers. In another important development Peet cited, in a number of cases the Board has followed the U.S. Supreme Court's 2018 *Epic Systems Corp. v. Lewis* decision "holding (contrary to the NLRB's long-standing precedent) that employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration do not violate the NLRA."

Email use. Finally, Peet pointed to the Board's invitation to file briefs on whether it should modify or overrule its rule under the NLRA, established in *Purple Communications*, that employers must permit employees who have been provided access to their employer's email system to use that system for statutorily protected communications on their non-working time. The case is *Rio*

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All-Suites Hotel and Casino (No. 28-CA-060841, August 1, 2018).

"The Board also asked whether the Board's standard should apply to computer resources beyond email systems, such as instant messages, text messages, postings on social media, and the like," Peet added.

GC actions. Turning to the Board's General Counsel, Peet underscored several developments, beginning with GC Peter Robb's direction last year that field office staff prosecute a broader array of cases against unions that engage in negligent behavior toward their members.

Duty of fair representation. The General Counsel Memorandum (19-01) "expresses a marked contrast to the Board's historical position with respect to cases addressing a union's 'duty of fair representation,'" Peet said.

A union owes its members an obligation to represent them in good faith and without discrimination and breaches its duty of fair representation when it engages in conduct that is arbitrary, discriminatory, or in bad faith, Peet explained. Under Board law, a union can defend itself against such a charge by showing its behavior was "merely negligent." Citing an 'increasing number of cases' where unions have employed such a defense, the memorandum *toughens considerably* the standards on unions," she said.

Other GC moves. Peet also pointed to these general counsel actions:

- An employer-friendly memorandum providing specific examples to regional offices (which investigate unfair labor practice charges filed by unions or employees alleging, for example, that an employer rule/policy violates the NLRA) and the public about which employer rules/policies, under the Board's *Boeing Co.* decision, likely are always lawful, provisionally lawful, or likely unlawful. For example, a rule that prohibited "behavior that is rude, condescending or otherwise socially unacceptable" is likely always lawful.
- A memorandum to all regional directors, officers-in-charge, and resident officers announcing immediate enactment of case processing changes designed to speed up processing of election and unfair labor practice cases, among other things.
- Pursuant to the Board's invitation to file briefs on whether it should modify or overrule its rule under the NLRA, established in *Purple Communications,* the General Counsel filed a brief with the NLRB urging the Board to overturn that decision and return to the *Register Guard* standard, which allowed employers to prohibit, in a "nondiscriminatory manner," the use of their email systems.

Joint-employer dilemma

One continuing controversy at the Board is its standard for when an entity will be determined to be a joint employer of another entity's employees for liability purposes. The "Trump Board" has been trying to change the current, broader standard to the more narrow standard used prior to the Obama Board's 2015 *Browning-Ferris* ruling. As Peet pointed out earlier, the Obama-era standard is viewed as being more union- or employee-friendly.

Employers in a quandary. What are our experts telling employers about the joint-employer standard? "The Board's controversial *Browning-Ferris* decision, if not dead, is clearly on life support," Bourgeacq said. "But it's still a bit too early for employers to attend its funeral."

The former inside counsel observed that "in the wake of the Board's short-lived reversal of *Browning-Ferris* in its *Hy-Brand decision* [later vacated], followed by the D.C. Circuit's cryptic affirmance of *Browning-Ferris* on appeal, employers and unions alike are still in a quandary as to what exactly are the running rules for joint-employment at the Board." We may all find out, he said, when the Board completes its current rulemaking over joint employment.

Proposed rule. Bourgeacq observed that in its current rulemaking, begun in September 2018, the Board appears headed toward codifying its decision in *Hy-Brand*, allowing a finding a joint employment only when the alleged joint employer exercises "substantial, direct and immediate control" over employees of the other employer, and in a manner that is not merely "limited and routine."

A word of caution. "Until we see the final rule, as adopted, employers need to be keenly aware that joint-employment status presents a significant risk to employers," he cautioned. "If an employer is found to have a joint-employment relationship with another employer, then the joint employer could have to bargain with the union representing jointly employed employees; could be liable for the other employer's unfair labor practices; and

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in the traditional labor context, could be subject to picketing activity that, without joint-employer status, would make such picketing unlawful."

"Employers need to be mindful of joint employment liability—in several contexts and not just with the NLRB—and to avoid or minimize directing or controlling employees of another employer," Bourgeacq continued. "Similarly, employers may want to scrutinize their contracts with other employers to ensure they do not contractually reserve the right to direct or control the other's employees to any significant extent."

Stick to *Browning-Ferris*! "Despite considerable optimism among management labor lawyers that the NLRB will overturn *Browning-Ferris* via regulation (and return to the Board's pre-*Browning-Ferris* employer-friendly standard), we are advising clients to continue to follow *Browning-Ferris*, since it is applicable Board precedent, and there is no guarantee that a final Board regulation will, indeed, completely undo *Browning-Ferris*," Peet said.

The Jackson Lewis attorney said her firm believes there is no guarantee that a final Board regulation will completely overturn *Browning-Ferris* for two reasons:

In the courts. First, the D.C. Circuit recently partially upheld *Browning-Ferris*. The Court affirmed, as consistent with common law, "the Board's articulation of the joint-employer test, which includes consideration of a putative joint employer's reserved right to control and its indirect control over the employees' terms and conditions of employment," Peet explained. "However, the court reversed the Board's application of the indirect-control element to the extent it did not distinguish between indirect control [that] the common law of agency considers inherent in ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment. The court remanded that aspect to the Board for it to explain and apply its test in a manner consistent with the common law of agency."

Via rulemaking. Second, and most importantly, Peet noted that the court cautioned the Board about its rulemaking, writing that "[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary."

Peet explained: "As a result of this caution, there is no guarantee or assurance that the Board will, in its final rule incorporate only a 'direct and immediate' control requirement because such a rule may not withstand judicial scrutiny.'"

Nevertheless, where employers seek advice about how to position their relationships with suppliers, contractors, and temporary agencies to defeat-joint employer status, Jackson Lewis is advising them about how best to do so, Peet said.

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> *"Employers need to be mindful of joint employment liability—in several contexts and not just with the NLRB—and to avoid or minimize directing or controlling employees of another employer."*
>
> *— Attorney Chris Bourgeacq (The Chris Bourgeacq Law Firm)*

Joint-employer challenges

What are some of the difficulties that employers face in dealing with the issue of joint employment? For employers trying to avoid joint-employer status, two issues came to mind for Bourgeacq.

Directing and controlling other employees. First, in many areas, employers have to comply with external rules for their industry. "Such compliance often requires employers to control or direct all employees—not just their own—performing work at the employer's premises," he explained. "To reduce the threat of joint-employer status in these situations, employers should ensure that their contract with the other employer requires that other employer to provide a supervisor to direct or control its own employees, or have contract language providing that from time to time an employer may need to require that the other employer's employees ensure compliance with external law."

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Franchise arrangements. A second situation that can raise joint-employment risks is in the franchise/franchisor arrangement, according to Bourgeacq. "There, often the franchisor requires certain standards and behaviors from the franchisee's employees," he observed. "Under even traditional joint-employment analysis, some of the franchisor's requirements appear as though it is directing and controlling the franchisee's employees," he explained, adding that it may indeed be doing so.

"That doesn't necessarily result in joint-employer status however," according Bourgeacq. "Some courts have found that such actions are simply efforts to maintain the franchisor's brand or to provide consistency and a certain level of quality control," he said.

"Consequently, it is important to ensure that the franchise agreement, or other agreement in the non-franchise context, state that any requirements that directly control the other employer's employees are taken for 'quality control' or 'brand maintenance' purposes," Bourgeacq advised.

Avoiding joint-employer status

"Until the NLRB adopts its final rule on joint-employment, employers are operating under the liberal Obama Board's *Browning-Ferris* framework for joint-employer status," attorney Chris Bourgeacq explained. "That means a mere reserved right to control the other employer's employees, without even exercising that right, could result in joint-employer status."

Bourgeacq offered these tips on how to avoid that result:

- Scour your hired labor agreements for language giving the employer the right to direct or control the other employer's employees, and avoid or dilute that language as much as possible.
- If an employer has to direct the other employer's employees, try to tie such control to compliance with external laws or rules, or to maintaining quality control standards.
- Where possible, require the other employer to provide a supervisor who will direct and control its own employees and act as a buffer between employers.
- When all else fails, include indemnification language from the other employer to cover liabilities for joint employment based on complaints relating to the other employer's employees.

Joint-employer status hard to avoid. As Peet sees it: "Given the breadth of *Browning-Ferris*, it is almost impossible for a user employer to avoid a finding that it is a joint employer of the employees of the supplier employer without relinquishing virtually all control over the supplier employer's employees."

"Even where there is no actual direct or indirect control by the user employer of the supplier employer's employees, the NLRB still will find the user employer to be a joint employer of the supplier employer's employees if the user employer has a 'reserved right of control'—a right of control it does not necessarily exercise but which it is allowed to exercise, usually pursuant to the terms of the agreement between it and the supplier employer," she explained.

Most problematic scenarios

Bourgeacq and Peet shared their insights as to the most problematic situations for employers given the makeup of the current Labor Board—and both pointed to joint-employer challenges.

"Joint employment remains a huge minefield for the franchise model and for staffing agencies," Bourgeacq said. "Those two employers frequently present factual situations with frequent shared control of employees, which are ripe for a joint-employment complaint."

"As noted above, the current Board is employer-friendly, while the previous Board was decidedly union-/employee-friendly," observed Peet. "Thus, the NLRB is not creating new problematic situations for employers."

"Other than staying abreast of changes to Board precedent by the current employer-friendly Board in order to be able to take full advantage when those changes occur, it appears that the most problematic situation for employers is the uncertainty about what the joint-employer standard will be in the future, whether to accept the fact that a joint-employer finding is inevitable, or to try to structure the relationship between it and a supplier employer/subcontractor," Peet suggested.

Best practices

Given the changes at the NLRB, what are the best practices for employers?

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Take advantage of employer-friendly changes. Peet reiterated that the current Board is employer-friendly, so changes at the NLRB are employer-friendly. "Therefore, best practices should be directed toward taking full advantage of those changes," she said. "In order to do so, employers need to stay abreast of those changes."

More on joint employment. Peet directed other best practices toward traversing the joint-employer standard. "Being found to be a joint employer brings with it substantial responsibility and liability," she explained. "For example, a user employer could be determined to be jointly liable for the unfair labor practices of the supplier employer without having committed any unlawful act on its own. It also means that the user employer may have a joint obligation to bargain with the union that represents the employees of the supplier employer about the wages and benefits of the supplier employer's employees."

Some employers may decide to accept the risk of joint-employer status in order to maintain their traditional operational structure, Peet observed. "One best practice is to make this determination early on with respect to every subcontractor, supplier, etc., employer with whom the contractor, user, etc., employer does business."

Practice pointers. If employers decide to attempt to avoid joint-employer status, best practices may include:

- Considering a more decentralized model of how they work with subcontractors, franchisees, distributors, and dealers, in which they control only the product or protect their brand;
- Having a clear understanding of how their relationship with the supplier employer will work. This includes addressing issues such as training, supervision, and complaints—in writing.
- Providing employees with an explanation of who they work for and how various work-related issues will be addressed;
- Including in the agreement with the supplier employer specific statements regarding the management of the employees, i.e., which employer retains rights to hire and fire, etc.;
- Using as few suppliers, subcontractors, etc., as possible to limit the situations where joint employment might be found;
- Thoroughly vetting the employment practices of suppliers, subcontractors, etc., to ensure they comply with all employment laws and treat their employees well;
- Not participating in contractor training, discipline, hiring, and firing;
- Limiting reporting obligations for the supplier employer to the user employer; and
- Limiting audits, reviews, and inspections of the supplier employer's practices, procedures, etc., to only those necessary to protect the brand.

Top tip. Peet said most importantly, employers that want to avoid joint-employment status should insist that employees are treated well and lawfully. "This is the best antidote against joint-employer issues ever being a consideration, because satisfied employees are less likely to want union representation or to initiate litigation," she said.

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About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for *Employment Law Daily*. As a practicing attorney for 12 years, Wolf 's experience includes litigation of employment and civil rights matters.

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