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**Richard D. Alaniz** • Aug. 19, 2016

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The first of this two-part series will describe some key changes in federal regulations



implementation alone.

Under the previous regulations, certain salaried workers who made $23,660 per year were entitled to overtime. The new rule nearly doubles that amount. Starting December 1st, most salaried workers who earn less than $47,476 annually must be paid time and a half when they work more than 40 hours in a work week. Every three years, the pay levels will automatically update, beginning Jan. 1, 2020.

## The federal contractor blacklisting rule

In July 2014, Obama issued Executive Order 13673, named the Fair Pay and Safe Workplaces Act. The order applies to the procurement under federal contracts of more than $500,000. It requires federal contracting agencies to collect information about potential prime contractor's three-year history of violations of 12 federal labor, employment, wage payment, and safety laws, including the Fair Labor Standards Act; the Occupational Safety and Health Act of 1970; the National Labor Relations Act; the Americans with Disabilities Act of 1990; and the Family and Medical Leave Act, along with "equivalent State laws." Dubbed the "federal contractor blacklisting list," the final rule is scheduled to be implemented this August.

In May 2015, the Federal Acquisition Regulatory Council published a proposed rule to implement the order. At the same time, the DOL also published its own guidance. In order to be eligible for contracts worth more than half a million dollars, contractors will have to self-report on their own records of compliance. At some undetermined point in the future, they will also need to self-report on the compliance records of their subcontractors.

## Joint employer

Employers who work closely with secondary companies and franchisers should be



investigations into 181 charges of violations of employee rights against McDonald's franchisees and the parent company, McDonald's USA LLC. While finding some of the charges without merit and others still under investigation, General Counsel Richard F. Griffin, Jr., found merit in 43 of the charges. He then took the ruling even further, finding that both franchisees and franchisors could be potentially liable for the violations. In February 2015, the NLRB filed more complaints against McDonald's for back pay and to reinstate workers who had been fired. The agency also wanted McDonald's to pledge to change working conditions. In March 2016, the NLRB took McDonald's to court.

In another equally significant 2015 ruling, the NLRB found that Browning-Ferris and Leadpoint, the staffing agency that provided workers to Browning-Ferris, were joint employers. The NLRB ruled that current standards for joint employers were failing to keep up with changing economic practices involving the relationships of temporary employment agencies. Under the new "joint-employer" test the NLRB looks at the right of a company to exercise control over another company's employees, regardless of whether the company ever actually exercises that control and regardless of whether the company has the right to directly exercise that control. Based on the way the NLRB articulated the right-to-control factor, it will be almost impossible for an employer who utilizes contract labor not to be a joint employer with its contracted staffing company. In January, Browning-Ferris launched its own legal challenge against the ruling.

## Wellness programs

In May 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued its final rules for wellness programs under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). The rules, which apply for

plan years starting on and after January 1st, provide some guidance for companies



Employee wellness programs must also be "voluntary." Among other things, that means employers cannot retaliate against any employees who choose not to participate in the program. The EEOC has also ruled that incentives, such as gift cards, gym memberships and discounts on health care premiums, cannot be more than 30% of the cost of self-only coverage. That percentage is less than the maximum amount permitted under the Health Insurance Portability and Accountability Act.

The rules also clarify that there is no distinction between wellness programs that are part of, or outside of, a group health plan. The new rules apply to all wellness programs that involve obtaining medical information from employees.

The EEOC also stressed that employers must keep all medical information they receive through wellness programs completely confidential.

## OSHA electronic record keeping

In May, the Occupational Safety and Health Administration (OSHA) published a final rule on electronic reporting of workplace injuries and illnesses. While the agency said the rule was designed to "nudge" employers, others are referring to it as a "name and shame" approach. Starting August 10th, employers in high-hazard industries must send OSHA injury and illness data that will be posted on the agency's website (OSHA has indicated it won't begin enforcing this reporting until Nov. 1, 2016. According to OSHA, the rule will modernize injury data collection to better inform workers, employers, the public, and OSHA about workplace hazards.

Under the new rule, organizations with 250 or more employees in industries covered by the recordkeeping regulation must electronically submit to OSHA injury and illness information from OSHA Forms 300, 300A, and 301. Companies with 20-249 employees in certain industries must electronically submit information from OSHA Form 300A only.

As overwhelming as these new regulations seem, there are even more to come. In the



*Richard D. Alaniz is senior partner at Alaniz Schraeder Linker Farris Mayes, L.L.P., a national labor and employment firm based in Houston. He has been at the forefront of labor and employment law for over thirty years, including stints with the U.S. Department of Labor and the National Labor Relations Board. Rick is a prolific writer on labor and employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick's monthly articles, can be addressed to Rick at (281) 833-2200 or ralaniz@alaniz-schraeder.com.*

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