LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, good morning everybody. As usual lots to report on. I'm going to start first with the fact that last Friday the Department of Labor Licensing & Regulation, if you don't know, published some additional materials having to do with the Maryland Safe and Sick Leave Act. So they published an updated version of frequently asked questions. They published a revised notice and they published some sample policies. I am going to comment on some of these this morning. I would invite you certainly to go on their website, its easy to get on their website, easy to download these documents that I am talking about, but I wanted to comment on some things that I think may be of interest to you.

First, with regard to the updated frequently asked questions, these were updated as of March 9th and I think that there are a bunch of them, not everyone is updated. So I am just going to pick out ones that were updated and which I think are of interest to you out there.

First, one of the questions is why does the law say that it became effective on January 1, 2018, but your guidance says that it became effective on February 11th, and the answer is, under their frequently asked questions, the Maryland Healthy Working Families Act was introduced during the 2017 session of the general assembly as drafted. The bill provided that the law became effective January 1, 2018. The general assembly voted to pass the bill but the governor vetoed it. When the general assembly came back into session in January 2018 it voted to override the governor's veto, the law became effective 30 days after the general assembly voted to override the veto. I know I have had questions from clients about this seeming discrepancy and it is clear that you don't have to retroactively go back if you are doing an accrual and accrual as of January 1, 2018, rather you accrue as of February 11th the effective date of the particular statute.

Another frequently asked question updated was, can an employer provide for different methods of accrual for different types of employees. The revised answer, yes. An employer could front load leave to full-time employees but provide that part-time employees earn leave on an accrual basis. The department recommends that such a policy be in writing clearly communicated to employees and apply consistently with regard to each type of employee.

Another question, which is new, can an employer count paid holidays towards earned sick and safe leave, does an employee accrue earned sick and safe leave while using PTO. Their answer, in general if an employer's

business does not operate on certain holidays and the employer provides paid time off for those holidays, the employer cannot, I repeat cannot deduct those holiday hours from an employee's earned sick and safe leave. If an employer's business operates on holidays and employees can work or are expected to work on the holiday, the employer may deduct from the employees leave accrual if the employee uses earned sick and safe leave, rather than work on the holiday. Whether an employee accrues sick and safe leave while on paid leave off status depends on the employer's policy. The law does not require that an employee accrues sick and safe leave while using paid time off. So obviously, most of you as employers will not want to have employees accrue any kind of sick and safe leave while they are using paid time off.

The next question that's revised is the question of what does regularly works less than 12 hours per week mean and what happens in weeks where an employee works less than 12 hours. The revised answer, the law does not define regularly. While the word is not defined in the law, the commissioner suggests using the everyday meaning of the word which is "normal or customary." That's an employee who normally or customarily works less than 12 hours per week would not be covered by the law. If an employee normally or customarily works 12 or more hours per week but the employee works less than 12 hours in an isolated week those hours in the isolated week would still count toward the employees sick and paid leave accrual. So I am not sure that it gives you any real guidance other than use your common sense about the use of the word regularly.

The next question revised or actually new, is how does an employer handle the accrual of earned sick and safe leave if the employer front loads leave and the employee is not hired at the beginning of the designated benefit year. Many clients have asked me this. Generally, their answer is, if an employer's benefit year begins on January 1st and the employer front loads earned sick and safe leave on that date. For an employee who is hired at any other date throughout the year, the employer will need to ensure that the employee earns sick and safe leave in an amount equal to or greater than the leave provided for under the earned sick and safe leave law until the beginning of the next benefit year. So practically, it seems to me if you have a sick and safe leave policy where you are front loading as of, lets say January 1 and you hire an employee on April 1st, you have two choices it seems to me under the law. One is, to give that employee the full 40 hours of the leave to use for the balance of the year, even though the employee wasn't onboard as of January 1st or you could have that employee accrue under the schedule provided in the act that is the employee who starts on April the 1st would accrue leave obviously at the rate of 1 hour for every 30 hours worked for the balance of the year and then once January 1st of the next year comes front load that employee with

40 hours. So, you have two options under these frequently asked questions as it seems to me.

Now, as I said they also put out a revised notice. I'm not seeing anything that's really all that profound in the revised notice although they have attached a translation of this notice in Spanish. Those of you who have any kind of volume of Hispanic employees may appreciate the fact that they have translated this notice into Spanish.

Finally, with regard to this particular issue, they have attached, Attachment A is the sample leave policies for employers awarding earned sick and safe leave at the beginning of the year. It is a two-page document again I don't think there is anything profound in it, although there are few things that I would say if you have a situation where you are front loading leave, there is a provision in here that states that the year commences on _____ and ends on _____. So you probably want to say in your policy when your leave year begins and when it ends. Also you want to make clear for those of you who have a front loading policy that employees are not permitted to carry over unused leave at the end of the year and that they will not be paid for any unused leave upon the termination of their employment. Also that they would not be permitted to use leave during the first 106 calendar days of their employment. For those who have an accrual policy they have a sample Attachment B which is the accrual method of leave, one of the things that you want to pay attention to in this policy is the statement that an employee may carry over any earned but unused sick and safe leave up to 40 hours, but an employee may not accrue more than 64 hours of sick and safe leave at anytime.

So again I invite you to go on their website, easy to find, all you have to do is google Maryland Department of Labor Licensing & Regulation, and it will take you right to the website and right on their home page is guidance that you can get into for the safe and sick leave law. Okay enough about that.

Last week on March 6th labor secretary Acosta rolled out a pilot program which the Department of Labor is going to use for six months, its called the Payroll Audit Independent Determination Program under the acronym PAID, Payroll Audit Independent Determination Program. This is a pilot program that the DOL is going to use and it is essentially a self-audit program under which employers can self-audit their wage and hour practices to ascertain whether they believe they have any liability for instance under misclassification of employees or nonpayment or mispayment of overtime or whether they have any off the clock kinds of liability and really the theme of this pilot program is for those employees who they find through the self audit to have been nonpaid or mispaid they can go ahead and they can correct it without paying liquidated damages,

they can report it to the DOL and in good faith the DOL will not impose any penalties or liquidated damages. There are many questions to be answered about this program and I suspect that in the next, I would say three to four weeks the DOL will put out either some frequently asked questions, but its purpose is good in the sense that it will allow employers at least under this pilot program to audit, self-audit their payment practices in a way that may be less damaging than if an employee brought a complaint to the DOL or the DOL audited your particular practices, but there are open questions and it doesn't necessarily mean that if you settle a Federal cause of action under the Fair Labor Standards Act then an employee would be precluded from bringing a state law action so there are many questions but many of you may have seen or heard of this program and that's what it is about and we are just going to have to wait and see what this program really proves to be, whether it is useful to employers or whether in some respect it even increases the risk to an employer by sort of opening up a Pandora's box. So stay tuned and I will report back to you one that.

I wanted to bring to your attention a case that was decided very recently by the Fourth Circuit which governs those of you who do business in Maryland, case is called Cooper v. Smithfield Packing Company. Again a Fourth Circuit case, in this case which was decided last Monday, not this past Monday, but the Monday before an ex-employee named Cooper sued Smithfield Packing on a sexual harassment case and essentially what happened was the employee Cooper alleged that her so-called supervisor had sexually harassed her for a long period of time. She reported it to the HR department. The HR department immediately began conducting an investigation, but one day after she reported it she resigned, certainly claiming a constructive discharge in the case. The case she filed before the Equal Employment Opportunity Commission. She then got obviously a right to sue suit in federal court. Federal court dismissed the case on summary judgment and it went up to the Fourth Circuit, and the Fourth Circuit affirmed the dismissal of the case. And there are a couple of noteworthy things about this in the decision. So, as the Fourth Circuit says in its decision, this clearly is not a case in which Smithfield adopted a "see no evil hear no evil strategy". They went on to say further the record evidence showed that Smithfield first learned of the supervisor's harassment only days before the employee voluntarily resigned. They pointed out that in the company's favor that they regularly conducted on an annual basis training of all of their employees. They had an anonymous tip line by which complaints could be reported and that the person who was alleged to be her supervisor was not really a supervisor but really more of a lead worker. The reason that is important is under the law if an employee makes a claim of harassment and it is only harassment which was allegedly conducted by a co-employee as opposed to a statutory supervisor, the standard under which liability could be imposed

is a negligent standard. That is, whether the employer knew or should have known of the particular acts in question. Here, they determined clearly that the alleged supervisor was not a supervisor, that immediately upon reporting the act of harassment or acts of harassment, the company undertook a clear investigation and did what any responsible employer would do. And there is an interesting quote in the case and I will read it to you. It says, "taking the evidence in light most favorable to Cooper who was the Plaintiff. A finding of negligence on this record would be tantamount to requiring Smithfield to exercise an all-seeing omnipresence over the workplace which this court will not do." So, it is sort of a lesson, it is a good roadmap for those of you in the sort of harassment field in that immediately upon getting the report of harassment the company reacted, began its investigation and before it even could finish the investigation, the employee resigned. And that is just a lesson that indicates that an employer has to be given a fair opportunity when the allegation is against a co-employee as opposed to a statutory supervisor to investigate the case, and it also harkens back to a 1998 Supreme Court case called Oncale v. Sundowner Offshore Services, which is that Title VII is not a general civility code that prohibits all verbal or physical harassment in the workplace.

And along those lines, this was just yesterday at a SHRM Conference in Washington DC. So, there is a report in Law360 today, which I get on a basis, and I will just read certain portions to you because it is, I think, relevant in today's day and age. It says, the US Equal Employment Opportunity Commission has not seen a surge in sexual harassment complaints since the start of the Me Too movement, but more workers have been threatening to sue acting EEOC Commissioner Victoria Lipnic, said Tuesday at a Society for Human Resource Management Conference, in Washington DC. She went onto say, people may not be yet be going to the EEOC and in fact we have not seen a huge surge in charges being filed with the EEOC, but what I am hearing is particularly from insurance carriers. They are seeing a lot more demand letters. In essence what that is saying is that there are demand letters being sent to employers, hopefully not you, from attorneys on behalf of putative plaintiffs; and of course, a demand letter would be a precursor to an employee filing a charge with the Equal Employment Opportunity Commission and then subsequently a lawsuit. So as this article says Lipnic joked that she and many of the HR representatives in the audience date their lives between pre October 5 and post October 5, a reference to the publication date of the New York Times blockbuster report into alleged sexual harassment by prominent movie producer, Harvey Weinstein. And finally in this article reporting on what Ms. Lipnic said, and it's not often that I agree all the time with the Equal Employment Opportunity Commission, but she did say something that I think and with which I agree, she said it is critical that management take the lead on addressing sexual harassment, and I quote, if

the leadership of the organization is not invested in making sure that the culture of their organization is one that does not tolerate harassing behavior and does not let these kinds of thing happen, then you can do training every six months and its not going to make much of a difference, Lipnic said. And I agree with that. I think that its one thing to do training, its one thing to publish your policy, but there really does need to be investment in the culture by your top leadership, which is why I always advise clients not only to engage in training but on an annual basis to have the CEO or president of your enterprise republish your workplace harassment policy as a critical and important policy of the company. Not only do I believe that it's the right thing to do, but I think it serves you well should you get these demand letters or should you get a charge of a workplace harassment by any employee or ex-employee, and its important to be able to demonstrate your commitment through top management that its not tolerated and in fact on an annual basis you republish these policies and make it known to employees that you have a culture of zero tolerance at your workplace.

Okay, those are the developments of the day. Michelle, can you take this off of mute? Michelle? Thank you. Okay any questions or comments that I can help by way of…somebody's got background. Thank you.

Anne: Howard, what is the name again of that Department of Labor pilot program on self-audit? I didn't catch it and I know it was PAID, but what is the name?

Howard Kurman: It's called the Payroll Audit Independent Determination Program. So hence the acronym PAID.

Anne: Okay.

Howard Kurman: And it's gotten some publicity, not a lot, but some publicity, and I'm just not sure whether that will be successful or whether employers will take advantage of it, but it's an interesting concept.

Anne: It is. The fact that you could get tripped up than by your state laws are the horns of the dilemma.

Howard Kurman: It is, and it is one of the major questions yet to be answered regarding how this will interact with state laws. I'm not sure that they've completely thought it through at the higher levels at the Department of Labor.

Anne: They might not be able to overcome state law claims…

Howard Kurman: That's right. They may not be able to.

Anne: May not have the legal basis to be able to do that, yeah but thank you, very interesting. Thanks.

Howard Kurman: Sure, any other questions? Okay well, if not, the next telebrief is on the fourth Wednesday, I think it's the 28th. It may be that I have to pre-record that I'm not sure, I have a management meeting that morning, but I will send out a notice one way or another. There certainly will be a telebrief. The only question whether it will be live Howard Kurman or recorded Howard Kurman. In any event, thanks for your participation and as always hopefully in the next two weeks will be copacetic for you all in the employment field. Take care.