LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning, today is Wednesday November 14, 2018 many of you may have gotten a prior notice that this is a pre-recorded telebrief. I apologize but I have a board meeting today that I had to go to so this will be pre-recorded. In any event, I wanted to start off with hopefully for some of you a helpful news release from the United States Department of Labor this goes back to October 19 and on that day the Department of Labor and I will just read the relevant portions from it states that United States Department of Labor today announced the launch of the new and small business assistance and the compliance assistance tool kits webpages. These new online tools assist American small businesses and workers with simple straightforward resources that provide critical wage and hour division information as well as links to other resources. The press release goes on to say that the web pages were established in response to feedback received from new and small business stakeholders voicing their need for a central location to secure the tools and information they need to comply with Federal Labor Laws. These new webpages provide the most relevant publications and answer the questions most frequently asked by new and small business owners. In quotes the press release states, "wage and hour division has long understood that the majority of employers want to do the right thing and comply with the law but they need to know how. These new webpages demonstrate our ongoing commitment to proactively help employers comply with the law and provide them the tools that they need to understand their responsibilities, we encourage all employers to visit these new web pages and reach out to us for assistance at any time. Additionally, the press release indicates that in addition to these new resources the wage hour division recently made available compliance assistance and videos. It provides brief plain language explanations of the Fair Labor Standards Act requirements and protections. The videos provide essential information employers need to understand their obligations under the law". So I invite you all obviously to visit these web pages they deal with the various laws which are enforced by the wage hour division, they do include videos and toolkits and other useful information and obviously many of you who incur wage and hour issues on a regular basis and often in a confusing array of laws and regulations may find this webpage to be useful. So again you can go on the Department of Labor's website and access these websites and also if you certainly continue to have issues or problems feel free to give me a call or send an email.

While we are discussing sort of governmental issues one might ask what will be the import of the shift in Congress to a democratic as opposed to a

Republican majority. Of courses as in any of these situations one never knows exactly how things will shake out. But I think you can probably be sure of a couple of things at least with regard to laws or proposed bills that may be introduced. So, on the one hand I think you can feel pretty confident that come January a Democratic majority in the house will certainly move towards increasing the minimum wage from its present 7 and quarter to probably a scaled in $16 an hour over a period of time. Now the problem is if anybody were looking for that to succeed you have the Republican majority in the Senate. So that probably will be one of the stalemates but I think you can look for that to be introduced in the democratic house. Another thing I think that you can look at probably is legislation that would be introduced in order to reverse the Supreme Court's decision last May in Epic Systems as you may remember that case decided by the Supreme Court indicated that employers have the right to avoid class action cases brought by employees by utilizing mandatory arbitration. That case was certainly heralded by employers and employer groups and viciously criticized by employees and employee-related groups. So I think that you will see some legislation introduced on the Democratic side in the house to avoid that and to essentially initiate the Supreme Court's decision in that case. Again this is one of those things that I don't think will succeed because of the fact that you have a Republican majority in the Senate. And while we are talking about issues under various laws, I want to bring to your attention a provision in the Family and Medical Leave Act which probably not a lot of people know about. Probably most people know that when an employee for instance goes out on FMLA leave or an FMLA qualifying reason whether it's a disability or work-related injury or illness the employer can mandate if it is unpaid leave that the employee use whatever vacation or PTO that the employer may have related to that employee's bank on the book. Again, so if it would typically be an unpaid period of time, the employer can insist that as a matter of policy the employee use existing PTO or vacation time. What many of you may not know is that under the FMLA regulations, and these are spelled out in the section entitled 825.207 DNE of the regulations which govern the application of the FMLA. If an employee goes out let's say on disability leave you can certainly mandate of course that FMLA leave be used. So that whatever FMLA leave the employee has in his or her bank would be expended. What you may not realize though is that if any of the leave is being paid for whether it's paid under a disability plan or under workers compensation absent the employees consent an employer cannot mandate that existing PTO or vacation be used to supplement that particular FMLA leave payment. So relying specifically on the language in the regulation let me read it to you, and this is under the Regulations 825.207, leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria. In such cases the employer may designate the leave as

FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid the provision for substitution of the employees accrued paid leave is inapplicable and neither the employee nor the employer may require the substitution of paid leave however employers and employees may agree where state law permits to have paid leave supplement the disability plan benefits such as in the case where plan only provides replacement income for two thirds of an employee's salary. The regulation goes on in the next subsection to say the act provides that a serious health condition may result from injury to the employee on or off the job. If the employer designates the leave as FMLA leave in accordance with the other sections in the FMLA Act, the leave counts against the employee's FMLA leave entitlement, because the workers compensation absence is not unpaid the provision for substitution of the employees accrued paid leave is not applicable and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree where state law permits to have paid leave supplement workers compensation benefits such as in the case where workers compensation only provides replacement income for two thirds of the employee's salary. Again let me go back and in essence summarize what these provisions are saying. An employee who goes out on any kind of serious illness or disability whether it's work-related or not can be subject to your employer policy of making FMLA leave run concurrently with a disability or the workers compensation injury or illness. However, whether or not you can supplement or use an existing bank of PTO or vacation or sick leave to supplement what the employee is getting is going to depend on whether or not the employee is getting some amount of money regardless of what amount either under the disability plan of your company or under your workers compensation insurance. If that employee is getting any kind of payment either under the disability plan or under your workers comp benefits you cannot mandate that it be supplemented by existing PTO vacation or sick leave unless the employee agrees. So this is a fairly esoteric and arcane point under the regulations of the Family and Medical Leave Act but I wanted to bring your attention to this because again you can mandate that FMLA bank time be used but you may not be able to mandate that the amount of paid vacation or PTO or sick leave the employee has on his or her bank be used unless the period of time under the FMLA is all unpaid time.

In a case very well worth watching in terms of whether the Supreme Court grants certiorari, is a case coming out of the sixth circuit and the issue there is whether or not title VII should be applied to protect transgendered workers under the prohibitions on discrimination on the basis of sex. So this was a case decided by the Supreme Court involving Harris Funeral Homes last spring in which the Sixth Circuit said that title VII's prohibition on discrimination against sex does indeed protect transgendered employees. Interestingly,

although the Equal Employment Opportunity Commission has taken the strong position that title VII's prohibition does in fact protect discrimination on the basis of sexual orientation which would include transgendered employees. The Justice Department has sided with the funeral home indicating that in its opinion Congress never intended the prohibitions contained in title VII, on the prohibition against sexual discrimination based on sex, never intended that to include transgendered protection or sexual orientation protections. The Supreme Court is not decided yet on whether or not to accept this case for review but it's being carefully watched and obviously since Justice Cavanaugh was confirmed last month we will have to wait and see whether or not there will be enough from the standpoint of support on the Supreme Court to take this for review and even if it's accepted for review whether or not a majority as opposed to probably a 5 to 4 majority against such interpretation would obtain. It would be a test clearly of the new justice on the Supreme Court if it is taken and would be a test of whether or not the Equal Employment Opportunity Commission's interpretation of title VII would be given an imprimatur by the Supreme Court which of course would have applicability all throughout the country. Now many of you know that there are various states that at the present time including Maryland which extends its protections under its analog to title VII statutes, to prohibit discrimination on the basis of sexual orientation including transgendered employees. So even though the Federal Statute does not create such protections many state statutes do in fact. But this would be a case of major-major import if it were accepted for review which will require four justices to agree and if it is accepted whether or not the EEOC's interpretation as opposed to the funeral homes and the Department of Justice's interpretation that from a strict constitutional interpretation that the prohibitions on sex discrimination do not extend to sexual orientation and transgendered employees. Of course I will keep you updated as we find out whether or not the Supreme Court actually accepts certiorari on this case.

In another governmental development there was a public announcement by the National Labor Relations Board on October 30 put out by the office of Congressional Public Affairs, the title of it is NLRB extends time for submitting comments on proposed joint employer rulemaking. Those of you who have participated in prior telebreifs know that I have spoken frequently about the fact that with a Republican board, National Labor Relations Board, it is likely that the rules having to do with joint employer status under the National Labor Relations Act will probably be amended to revert back to the prior standard of whether or not two employers will only be found to be joint employers if both exercise direct control over the terms and conditions of employment of an employee, as opposed to the Obama standard which was that an employer could be found to be a joint employer under the National Labor Relations Act even if it only exercised

indirect control over the terms and conditions of employment. My sense is that there have been so many comments submitted to the National Labor Relations Board and so many requests for an extension of time that in fact they have done that as the press release reads the National Labor Relations Board is extending the time for submitting comments regarding its proposed rulemaking concerning the standard for determining joint employer status under the National Labor Relations Act for an additional 30 days. The submission window is currently open and interested parties may now file comments on or before Thursday, December 13, 2018 with then responses due by December 20, 2018. So again this was something that was started weeks and months ago it will extend into December and we probably will not get some definitive rule promulgated by the National Labor Relations Board on this issue until early winter or perhaps mid winter or early spring of 2019. Again I will keep you updated on this.

Interestingly when talking about the National Labor Relations Board's proposed comment period on joint employer rule, on October 17th another governmental agency again the Department of Labor indicated that it was going to as part of its regulatory scheme addressed not only the joint employer rule under the Department of Labor's jurisdiction but also coming back to the overtime rules that have been the subject of discussion and regulation in the past couple of years also indicated by the Department of Labor that they were going to address that. So first the Department of Labor announced on October 17th that it would create its own joint employment rule, my guess is that it will be similar to the rule which is eventually adopted by the National Labor Relations Board, in that under the Fair Labor Standards Act two employers probably will not be found to be a single employer unless and until both of those employers share or codetermine the hours and terms and conditions of employment of the subject employees in other words it will move away I believe from the Obama era interpretation of indirect control over employees. So I think it will be a more employer friendly rule similar to the one that I think will eventually be promulgated by the National Labor Relations Board. Probably more important for all of you is that now the Department of Labor has said that it will not be until March of 2019 that it will really disclose or note its rules having to do with the overtime issues that we talked about since December of 2016 and before. You may recall that back in 2016 specifically December 1, 2016 was supposed to be the date on which we would go from a salary exempt test of somewhere around $24,000 a year to somewhere around $47,500 a year. That was subjected to litigation and of course we had a change in administrations in 2016 in November. So now what the Department of Labor is saying is that it is extending the period of time within which the issue of whether or not somebody meets the exempt or non-exempt test to March of 2019. This is about the second or third extension of course that the Department of Labor has granted since this issue has come up also signaling my opinion that it

is simply a political hot potato. In terms of my estimation of what will occur is I do think that there will be a change come March of 2019 for the salary test for exempt employees. Now remember in order to be exempt you not only need to satisfy the salary test but you need to satisfy the duties and responsibilities test that would land you in one of the exempt categories of executive, administrative, outside sales person, professional or computer professional. But I do think that come March of 2019 it is likely that even under a Republican Department of Labor the salary test will come in at somewhere between $30,000 and $35,000 a year of course which is a lot less than the drastic change that would have been implemented had the Obama era regulatory scheme be implemented. So stay tuned for that so we have two issues that are really on the horizon, one issue is being decided by both the National Labor Relations Board and the Department of Labor, that issue is the issue of whether or not two employers would be viewed as being a single employer as opposed to two separate employers for purposes of liability, the second issue by the Department of Labor as to whether or not the salary test for exempt employees should be increased as to the latter again. I do believe that it will be increased come March 2019 somewhere in the $30,000 to $35,000 range.

Finally let me say that with the mobilization of many people in recent political movements particularly which led to Democratic Congress I think we may also see an increase in attempts by unions to organize unorganized workers which may be the case of some of you out there. One of the things that I think that you really ought to do is what I would call sort of a union avoidance audit that is making sure that your policies and procedures are in compliance with the National Labor Relations Act in particular your no solicitation and no distribution rules of which you should have very strong policies but legally sufficient policies in your handbook. That it would not hurt to have a union avoidance type of training with your managers and supervisors to allow them to understand what can be said, not said to employees which should be noticed, are there any sort of unresolved grievances in your workplace, because the last thing that you want is in an era when there may be increasing pressure by labor organizations to organize the unorganized is to be hit with surprises. So I would encourage you to at least think about your union avoidance plans and your union avoidance education that you may want to utilize with your managers and supervisors coming at the end of 2018 or perhaps at the beginning of 2019. Any questions about that obviously I am happy to help you out with but it would not be a surprise to me to see that in 2019 we see an uptick in the amount of union organization among those companies which here before have been unorganized.

Okay those are the developments for the day again I apologize for not being present physically obviously if you have questions feel free to call

me on my office number 410-209-6417 or my email hkurman@offittkurman.com and we will be live for the next telebrief which is the fourth Wednesday in November. Thanks very much everybody take care.

[________________]: All right thank you everyone as Howard mentioned this was recorded so he is not on the call to answer questions but please feel free to reach out with him with any that you do have and we hope you all have a happy Thanksgiving. Thank you.