LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, it is 9:02, so it is our lift off time. Well, good morning everybody, it is indeed mid-March, hard to believe that but there is plenty to report as always in our field. So last Thursday, March 7, 2019, some of you may have seen the announcement by the Wage and Hour Division of the United States Department of Labor in which the Department of Labor said as I quote, the United States Department of Labor announced the Notice of Proposed Rulemaking that would make more than a million more American workers eligible for overtime. Under currently enforced law, employees with a salary below $455 per week, which amounts to $23,660 annually, must be paid overtime if they work more than 40 hours per week. Workers making at least this salary level may be eligible for overtime based on their job duties. This salary level was set in 2004. The new proposal would update the salary threshold using current wage data projected to January 1, 2020, the result would boost the standard salary level from $455 a week to $679 per week, equivalent to $35,308 per year. The department is also asking for public comment on the language for periodic review to update the salary threshold. So those of you who have participated in my telebriefs for many months know that under the Obama administration, they had proposed a change in the salary exempt level to almost $47,000 and change, which really was a ridiculous amount given the fact that it was almost twice as much as the current level, and you know that I had predicted that when the Department of Labor proposed an adjustment to that salary exempt level, that it would be between $30,000 and $35,000 a year and indeed my prediction has come true, that the new projected and the proposed rule is at $35,300 and change, and the Department of Labor has proposed that this would go into effect January of 2020, so all of you out there obviously have time to make adjustments if you need to make adjustments in preparation for this because I do think this will be enacted come 2020. There are a couple of other points that I wanted to mention about this which are significant, and by the way, the proposed rule is 220 pages long, so we are not going to go over all 220 pages but there are a couple of things I did want to mention, so the Department of Labor did not, I emphasize, did not, make any changes to the duties test and as you know, there are three major classifications of exempt status, they are the administrative exemption, the professional exemption, and the executive exemption. Besides the salary test, the Department of Labor is not proposing any change in those duties for either of those three proposed exemptions, just the salary. They also have not proposed an automatic adjustment, you know, a so-called [_____3/55_____] adjustment to the $35,000 level. Rather they

have proposed that every four years the Department of Labor would propose a salary adjustment which again would be subject to rule making or publishing of the rules in a federal register and asking for comments. So these are significant developments and the other significant development along with this is that there used to be under the existing rule, an exemption for those people making $100,000 or more, so that there would be a short test for those people, some of you out there would have people making $100,000 or more and they would not have to necessarily meet the duties test for administrative executive or professionals. Surprisingly, the Department of Labor has proposed that that figure be moved to a $147,000 a year. So that leaves a gap between a person who is making $100,000 and $147,000 under which those individuals would have to meet the duties test in those three exemptions. So, again, this is not law yet, it needs to go forward and be formally proposed as a rule but I do think it will pass, and I do think it will be enacted come January of 2020. So what does that mean for those of you out there practically. What it means is that you should be taking a look at your exemptions, your salaried exemptions, either administrative, professional or executive, and if anybody is under the level of $35,000 a year, you better be making plans to either change them to a non-exempt position or to up their salaries to take into account the Department of Labor's new salary structure or new salary tests. Again, this won't be effectuated until January of 2020 but don't wait until December 2019 to begin looking at this, I think you ought to begin looking at this right now, so take a look at your exempt salary structures and if there needs to be an adjustment, certainly seriously contemplate those adjustments.

Okay, another Department of Labor, at least peripheral event, so under the new Trump proposed budget, and of course the proposed budget, I am sure will be adjusted, but under this proposed budget of the Trump administration, the Department of Labor's funding would be cut by about $1.2 billion, which is a very significant cut and, you know, who knows where this will wind up but the budgets for both the Department of Labor, the National Labor Relations Board, and the EEOC under this proposed budget have been cut significantly. The reason I bring it up is obviously the extent to which there are actual cuts instead of proposed cuts in the budgets of these agencies, the less they would be able to spend on auditing and enforcement efforts. As always, there will be a compromise I'm sure and the actual amount by which these will be cut, I'm sure will be adjusted. But it is significant at this point and since we were talking about the Department of Labor, I did want to mention those to you. There is another significant development, you know, I have in the past telebriefs talked about the EEOC's requirements for filing the EEO-1 report. Now those of you out there with more than 100 employees, have historically filed EEO-1 reports which have been pretty standardized over the years to take into account reports on the race, gender and ethnicity of those

particular job categories. Under the Obama administration, the EEOC proposed then in addition to those reportable statistics, that employers with more than 100 employees would also have to report W2 wage data and hours worked for 12 different pay bands. Well, that was the subject of litigation and ultimately the courts or at least one court stayed enforcement of that particular guidance. Significantly, on March 4th , which was just, you know, a week-and-a-half ago, the United States District Judge, Tanya Chutkan is her name, ruled that the Office of Management and Budget was wrong to cause that particular aspect of the EEO-1 reports and therefore said that the EEOC can go ahead and enforce its initiative in not only mandating that those of you with 100 or more employees report on the demographic data of race, gender and ethnicity but that the EEOC can compel employers with more than 100 employees to report on W2 wage data and hours worked, which will be a significant burden, it seems to me, on those of you out there who have to file these reports. Now we know that when the government shutdown came into effect, the EEOC extended the reportable data to May 31st but even at May 31st, which is only a couple of months from now, you all would have to undertake significant adjustments in gathering this data and reporting the data to the Equal Employment Opportunity Commission. I believe what's going to happen is that the Equal Employment Opportunity Commission will extend that reporting period out from May 31st to who knows how long, 30 days, 60 days, and in the meantime the question will be whether or not this District Court Judge's decision will be appealed to the Circuit Court which would then be able to stay the enforcement of that particular component of the EEOC's reporting requirement, pending a decision by the Court of Appeal. So this is a complicated issue at the present time and I do think, number one, the reporting date will be extended out from May 31st , and two, I think it is likely that there will be an appeal of this decision to the Circuit Court of Appeal at which time the reporting data will revert back to, for the time being, the historical simply gender and ethnicity as opposed to the more burdensome requirements, but stay tuned on this and I may even have some further information as we get into the next couple of weeks to see whether or not there is going to be an extension of the deadline on the one hand, and two, whether or not there will be an appeal and a stay at the same time, of the EEOC's requirement of the second component of this EEO-1 report.

Okay, another sort of statistic which I think is relevant to you all, even if you don't have unionized workforces, is that the Bureau of Labor Statistics recently reported that the overall private sector membership of unionized employees has dropped to 6.4% keeping in mind that it was 6.5% in 2017, so we see a continual decline of the private sector that is unionized and, in gross terms, only 14.7 million employees belong to unions now compared to 1983 when 17.7 million people belonged to unions in the private sector. So that it doesn't mean that those of you who

are in kind of union vulnerable industries or entities should stop your union vulnerability audits or education of your management staffs with regard to union vulnerability, it just means that the continuing trend is that there is much less of a unionized workforce in the private sector, much less than 1 in 10 of every employee sector is unionized in the private sector, so that is a significant development it seems to me. I wanted to bring to your attention a case which was recently decided in a Federal Court in Louisiana. The case is called Peddy v. Aaron's, Inc. and in this case, the employee had a workplace injury in 2009 and filed a workers' compensation claim. After this claim was filed, the employer accommodated this employee's medical restrictions for several years following this particular accident. However, after a period of time, the employer stopped accommodating the employee's perceived disability and ultimately terminated the employee for what it deemed to be nondiscriminatory reason in 2016. The employee then filed a lawsuit against the employer alleging several causes of action including a failure to accommodate his disability, outright disability discrimination, and intentional infliction of emotional distress. At the time he filed his lawsuit, his workers' compensation claim was still pending. Then what happened was, the employee along with the employee's workers' compensation attorney, settled the workers' compensation claim while this disability lawsuit was pending, and in the settlement agreement of the workers' compensation claim, there was a comprehensive and sort of universal release of "all liability of any nature whatsoever whether past, present or future including all claims arising under the laws of Louisiana and the laws of the United States." So what happened was the employer having this comprehensive release in hand, then moved to dismiss the lawsuit in Federal Court, which was granted. Now why do I bring this to your attention? Well, I bring it to your attention because those of you out there who have any kind of frequency of workers' compensation claims, need to make sure that there is communication between you and your workers' compensation attorney. Many workers' compensation attorneys are not schooled in issues having to do with disability law under the ADA or state laws which are similar, and when they go ahead and there may be a settlement of a workers' compensation claim, they do not necessarily close out all kinds of disability claims with a comprehensive release. So, if you are ever in a situation where you have contemplated settlement of one of your workers' compensation claims, you really ought to communicate with your workers' compensation attorney. Again, many of them are not knowledgeable about ADA claims or state analogous claims that the release of the workers' compensation claims should include a comprehensive release of all disability claims and, therefore, if you are able to accomplish that in the settlement of the workers' compensation claim, you can foreclose any possible ADA or state claim based upon the same disability arising out of the workers' compensation claim, and that is a very valuable thing as you can see from this particular case that, you

know, I have talked about. One of the last things I want to talk about is those of you who have outside salespeople within your workforces, know that under the Fair Labor Standards Act there is an exemption for outside salespeople as opposed to inside salespeople. So inside salespeople under the Fair Labor Standards Act are not exempt from overtime requirements or overtime payment obligations. Outside salespeople are exempt and so the question becomes, you know, what are the requirements for exempting an outside salesperson under the Fair Labor Standards Act, and there are two essential requirements. One is that the employee's primary duty must be the making of sales or obtaining orders or contracts or services for the use of facilities. So their primary duty has to be of course making sales or obtaining orders or contracts. The second component is the one that is problematic and often in controversy, if you are seeking to classify someone as an outside salesperson and that is that the primary duty of making sales or obtaining orders must be customarily and regularly engaged, and according to the regulations, away from the employer's place of business in performing such primary duty. That generally means that your outside salesperson who is performing sales duties, is going to be doing that in a face-to-face meeting outside of your general facility and it does not mean that if the employee is generally making calls from his home, that is not outside of the employer's primary facility. It does mean and it is sort of a common sense answer, that in order to properly classify somebody as an outside salesperson, you are going to have to have somebody who is generally seeing customers or clients at that client's place of business or at some other facility, could be a meeting at a restaurant or some other facility, but it does not mean that just because the employee is inside of your office and making regular calls to his or her customer, that that classifies that particular employee as an outside salesperson. Generally, that person is going to be more of an inside salesperson than an outside salesperson, and the Department of Labor looks closely at these particular classifications because if you classify that person as an outside salesperson and you are wrong, and that person typically works more than 40 hours in a week, you are going to have overtime obligations. So those of you out there who regularly employ so-called outside salespeople, make sure that the person is actually doing his or her duties on a regular basis by making calls, sales calls or service calls, to the clients or customers, outside of your office and outside of his or her home, whether it is at the customer's place of business or some other facility, which is neither the employee's home nor your regular place of business.

All right, those were the developments for the day. Casey, can you take this off of mute please. All right, thank you. All right, as always, if there are any questions or comments, happy to answer on here or in a different form privately at my email hkurman@offitkurman.com or my private direct number 410-209-6417. Okay, any questions? Okay, well it looks

like everybody either absorbed what I had to say or ignored it. So, I am not sure which one but happy to answer questions in a different form, and as I always say, we will see you figuratively anyway in the next telebrief, which is the fourth Wednesday in March, so that would be the 27th of March. So, see you all then and have a great rest of the week.