LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
August 13, 2014

Howard Kurman: All right, good morning everybody its Howard Kurman. Welcome to our August telebrief. As you know we do these on the second and fourth Wednesdays of every month. The next telebrief will be Wednesday, August 27. It's hard to believe that August has come and gone but that is the way the summer's usually go. So, I wanted to bring up a few legislative sort of developments.

The first thing that I will mention is those of you who do any business in New Jersey, just two days ago Governor Chris Christie signed what is called "the opportunity to compete act" and essentially this is another ban the box statute, you have heard me talk about ban the box legislation that was passed in Baltimore City. This limits any New Jersey employer or any business doing business in New Jersey to inquire into a particular applicant's criminal record. The law in New Jersey will become effective March 1, 2015. This is, I guess, indicative of many of the statutes that ____are being across the country. By the way, please mute your phone if you are using background noise or talking or anything else please, I appreciate that. The New Jersey ban the box legislation is similar to other sorts of ban the box statutes in different jurisdictions with some differences and I will just briefly review it for those of you who might be interested or who plan on doing business or do business in New Jersey. So, it prohibits employers from asking about an applicant's criminal record until after the following hiring steps have been completed. One, is where the employer has conducted an interview, two, is where the employer has made a determination that the applicant is already qualified at least minimally for the job and selected the applicant as its first choice. However, a difference in this statute unlike the Baltimore statute that we have talked about before is that New Jersey employers can make these criminal inquiries prior to making a formal offer of employment. But they are prohibited from inquiring into, like in many statutes, expunged criminal records or arrests that do not result in a criminal conviction and certain other things that would also preclude the employer from looking into the background of the applicant. Unlike the Baltimore statute, this does not have criminal penalties associated with it, it does have civil penalties of a $1,000 for a first violation, $5,000 for a second violation and $10,000 for a subsequent violation. And unlike other jurisdictions including Maryland there is no private right of action for those who may have been wronged by the violation of the statute. So again, this is indicative of a general trend across the country. I bring it to your attention if you are doing business or planning on doing business in New Jersey at least as of March of next year.

Interestingly in Congress on July 30th, so this is just a week and half ago more or less or two weeks ago, there were two bills introduced into Congress one by

Democrats and one by Republicans, again which points out simply the fact that neither party can get along with the other and neither party really has a realistic shot of getting any of this legislation passed but I will review it for you quickly. The Democratic statute was sponsored by Congressmen, Keith Ellison, he is a Democrat from Minnesota and John Lewis, he is a Democrat from Georgia. It is called the Employee Empowerment Act and what this would do is give employees a private right of action to sue for alleged violations of Section 883 of the National Labor Relations Act. You have heard me talk about Section 7 of the National Labor Relations Act and I will talk a little bit more about that in a couple of minutes but Section 883 is a unfair labor practice in which an employer makes discriminatory choices based on an individual's union membership or lack thereof or union activity or lack thereof. And that becomes what is called an unfair labor practice under the National Labor Relations Act. Under the statute or at least the proposed statute by Congressmen Ellison and Lewis, this would not only give the employee a right to file a charge with the National Labor Relations Board but would also give him a private right of action where he could sue and obtain potentially front pay and punitive damages, which are not amenable or not achievable under the National Labor Relations Act. I think the chances of this passing are non-existent frankly.

The Republicans on the other end of the isle introduced on the same day a statute or proposed statute called the Union Transparency and Accountability Act. This was introduced by Senator John Thune who is a Republican out of South Dakota. This, in turn, would require labor unions to disclose detailed financial information concerning their interests in certain trusts and provide information about transactions involving the purchase and sales of assets and any potential conflicts of interest that they have. I think the chances again of this passing are slim to none. There is already a requirement as you probably know under the Department of Labor for Unions to file annual financial statements and I do not think that the Republicans would have near the support that they would need in order to get this enacted as a law. But it just goes to show you, I think, that in Congress and in the Senate the parties are so bitterly divided that any chance of passing workplace legislation is pretty slim, which takes me to the next development which occurred and this would affect any of you out there who are federal contractors or who are thinking of becoming federal contractors.

So this was on August 1st or actually an executive order signed July 31st by Obama called the "Fair Play and Safe Workplaces Executive Order" and it would apply to new federal procurement contracts. Essentially, what this would do is it would require all federal contractors to essentially indicate to the agency for which they are bidding on a particular job to notify that particular agency in order to report employment and labor law violations both when they bid on the job and after every six months of being on the job because this would be deemed to be a disqualifying factor either in terms of not allowing the bid to go forward or perhaps the barring a federal contractor if they were deemed to be serious enough federal violations of labor law. So that these federal contractors or any company proposing to be a federal contractor will have to advise

agencies whether there have been any administrative merit determinations, not just charges, but merit determinations, arbitration awards or decisions or civil judgments rendered against them within the preceding three year period with regard to any of the following workplace legislation or workplace loss. The Fair Labor Standards Act, OSHA, the National Labor Relations Act, the Family and Medical Leave Act, The Davis-Bacon Act, Service Contract Act, Title 7 of the Civil Rights Act, the ADA, the Age Discrimination and Employment Act, Executive order 11246 which is Equal Employment Opportunity, Vietnam Era Veterans Readjustment Assistance Act, Section 503 of the Rehabilitation Act which is similar to the ADA, and executive order 13658 which pertains to federal contractors paying the updated or adjusted minimum wage. This is, in my opinion, a fairly dramatic again statute or at least proposed legislative enactment by Obama, again, I think enacting through executive order something, which would never pass through Congress and this will at least right now take effect in 2016 after there are regulations that are enacted by the Federal Acquisition Regulation, which is counsel which is far and by the Department of Labor. In addition to these disclosures that a company would have to make that it also requires contractors to provide their employees with documentation detailing their hours worked, their overtime hours, pay and they also have to provide exempt workers with documentation detailing that status as well as independent contractors detailing why they believe they are independent contractors. It's a fairly wide ranging executive order. I do not know if it got a lot of publicity but it was signed on July 31st just two weeks ago. And I am sure there will be a lot more written about this. There will be regulations that are issued and there are Department of Labor regulations that will be issued but I will keep track of it and you guys should keep track of it, too if you are in the federal contractor arena.

Let me turn my attention to another case decided on July 31st by the National Labor Relations Board called Fresh and Easy Neighborhood Market. This is another case where the NLRB decided that an employer's confidentiality policy or security policy violated Section 7 of the National Labor Relations Act, again Section 7 of the National Labor Relations Act has to do with the employees right to engage in concerted protected activity. This was a two to one decision with the one descending vote no surprise the Republican member, Harry Johnson. In the Code of Business Conduct of this company, it was a 20 page document. There was a policy entitled confidentiality and data protection which included the following rule and I will read it in quotes "keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained." The board went on to say that this particular rule could be understood by the company's employees as prohibiting the use of employee information and would potentially impair or impede the exercise of Section 7 rights by employees. In the descending opinion by Member Johnson he basically stated that the best approach is to examine the overall context of a disputed rule from the general purpose of the document in which the rule was contained, its introduction, its general sections and topics and accompanying explanatory texts and finally to the disputed rule and the text around it to give a rule a reasonable reading. Basically, he said that in this

context the rule which I just read to you which show the employer was primarily addressing and concerned with ethical concerns rather than employment conditions and, therefore, he would not have found a violation of Section 7 of the National Labor Relations Act. I know that I have reviewed many of these cases with you in the last several weeks and months but this is the most recent one and again I caution you to go back and take a look at your confidentiality and your information dissemination policies that you may have in your employee handbooks or your stand alone statements or policies and again as I have said to you before at the very least you should have a disclaimer in your handbook or in your policies which would indicate that nothing in those policies would be construed, interpreted or applied to prohibit the exercise by employees of Section 7 rights under the National Labor Relations Act or any other similar statute. That will not necessarily guarantee you that you will be safe from NLRB scrutiny but it certainly will help you out and will go a little way towards protecting your statements. So take a look at your handbooks make sure that you are in a position hopefully of having that disclaimer put in.

Let me talk about a Maryland Federal District Court case which I think is an interesting case just decided very recently by Judge Bennett of the Federal District Court here in Baltimore. It has to do with on call pay and some of you may have on call pay and this particular situation dealt with a security guard that was employed in the gated residential community of Gibson Island in Anne Arundel County, those of you who know Gibson Island is a very kind of exclusive wealthy gated community in Anne Arundel County and this woman was a private police officer for the Gibson Island Police Department. She was under the requirement that she would have to live on the island, she was provided with housing by the police department, she was paid hourly and her duties included manning the gatehouse, the guards on Gibson Island, patrolling that particular island and responding to medical, police and fire emergencies. She was required to respond to calls but she was given the freedom during these night hours to be able to eat, watch television, sleep and essentially not really required to do anything unless she got a call. Eventually, she filed a lawsuit in Federal Court alleging violations under the Fair Labor Standards Act. And, of course, the big issue or one of the big issues in the case decided by Judge Bennett was whether or not she would be entitled to be paid for this time that was after hours where she was so-called on call but still allowed to essentially do many private kinds of activities. And as the court inquired into this question again they you know they sent out the inquiry of whether or not under the Fair Labor Standards Act the time which is being spent on call by the employee is predominantly for the employer's benefit or predominantly for the employee's benefit. And it's the difference the old age old adage between those employees who are engaged to wait in which case they are to be compensated for that time or whether they are simply waiting to be engaged which would take into account those employees who are on call but nevertheless can exercise considerable freedom in doing what they need to do or want to do during the on call period of time. So, the court reviewed several factors that they look at including the agreement of the parties the nature and frequency of the services that are provided in relation to the time spent waiting, where the employee is

waiting, whether the employer has to carry a beeper or leave home, where the employee's ability to switch on call shifts and whether the employee actually engaged in personal activities during the on call time. And as the court said when an employee resides on the employees premises there is a presumption that the employee is not working the entire time that the employee is on the premises. In this case, the court made note of the fact that during the time that the employee was allowed to stay in her home or if required to be on call, she could stay in her home or travel throughout the Gibson Island, she slept, she watched television, she spent time with her son. And so essentially what the court decided was that she was not really engaged to wait but was simply waiting to be engaged and that, therefore, the time that she was claiming was not compensable work time. So, I bring this up because from a wage and hour standpoint many of you may have employees who are on call and of course you need to draw the delineation between those employees who really are restricted in what they can do and what they cannot do in which case all of the hours spent on call would be compensable work time as opposed to those employees who can exercise a fair degree of personal freedom whether it is going to a movie, watching television, going bowling etc., where the only thing that they are required to do is carry a beeper and then if they are called that particular time would be viewed as work time. So those of you who have any kind of situation where you are utilizing on call or requiring on call of your employees go back and take a look at these factors, take a look at the context in which the employees are being required to be on call and then you can make the determination of whether such time or all time is deemed to be work time or whether only part of that is deemed to be work time that is the time actually spent which is responding to a particular call.

Talking about wage and hour issues I would indicate that this was just publicized two days ago that the Department of Labor entered into a settlement agreement with LinkedIn, I know many of you out there use LinkedIn as I do, for violating the FLA's provisions on overtime and record keeping. Let me give you an idea about what it can cost the settlement was $3.3 million and that is a lot of money for any company even if the company is as big as LinkedIn. This covered 359 employees both former and current employees and had to do with employees who were not paid for all hours worked as well as for the failure of LinkedIn to accurately keep work records. If it can happen to LinkedIn it certainly can happened to any of you out there and I believe that because of the activism of the Department of Labor these days and we have talked about this in terms of audits being conducted by the Department of Labor and the activism that is really being exhibited by the Department of Labor I think that you need to go back and conduct periodic audits not only on whether you are paying work time and the minimum wages and properly classifying people as exempt or non-exempt but also whether you are accurately keeping pay records whether in hard copy form or electronic form because when the Department of Labor audits your policies not only do they look and see whether people are paid correctly but they also look and see whether your records are kept correctly. So if it can happen to LinkedIn it can certainly happened to you all and I would encourage you at least periodically and I would suggest probably on a once a

year basis to do these wage and hour searches and self-audits so that you can self-identify any problems and move to correct them. So those are the developments for the day as always I invite any questions or comments any of you may have if you rather do it in private you can certainly call my work phone which is 410-209-6417 or e-mail me at hkurman@offitkurman.com. Does anybody have any questions or comments? Okay, well if not.

_____: Well, I am sorry I did have a question. What was the executive order again in which there were changes to the requirements for federal contractors and reporting violations?

Howard Kurman: It was the executive order it signed July 31, 2014, its called the Fair Pay and Safe Work Places Executive order. I do not know if it has a number but I am sure if you Google it you can come up with it, I am not sure if it has even been assigned a number yet.

_____: Okay thank you.

Howard Kurman: Sure. Any other question? Okay, well if not hopefully we will see you or at least talk to you in the August 27th telebrief. Thanks a lot everybody.

_____: Thank you.

Howard Kurman: Bye, bye.