LABOR & EMPLOYMENT TELEBRIEF
By
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Okay, well we are going to get started. My official clock is 9:02, which as you know is our starting time. So, good morning to all. I cannot believe this is the last telebrief of 2015, but it is and the holidays are upon us, so the next telebrief, the first one in 2016 will be Wednesday, January 13th. So plenty to report today as always.

Let's start at the top the Supreme Court has agreed on December 4th to review a decision coming out of the Eighth Circuit involving the equal employment opportunity commission and a question before the Supreme Court is whether or not the EEOC should be assessed attorney's fees for its failure to engage in mandatory conciliation when it found probable cause against the trucking company called CRST Van Expedited. Essentially what happened in this case is that the EEOC wound up filing a lawsuit in Federal District Court against this trucking company on the basis of its belief that it had violated Title 7 of the Civil Rights Act and the trucking company moved to get summary judgment on the basis that the EEOC had not engaged in mandatory conciliation as it was required to do under Title 7. As you all know, if the EEOC finds probable cause in any particular case it is obligated to engage in conciliation efforts in an attempt to resolve the case prior to filing a suit against an employer. The EEOC apparently did not do that here and the district court not only ruled for the employer but assessed the EEOC $4.7 million in attorney's fees. When the EEOC appealed to the Eighth Circuit, the Eighth Circuit reversed the trial court below and indicated that it viewed the EEOC's conduct or behavior in this case as reasonable. The trucking company then petitioned the Supreme Court for review, which as I indicated on December 4th agreed to accept review and so we will see whether the Supreme Court will uphold the position of the trucking company that in this case as in any case, a prevailing party in a discrimination case is entitled to attorney's fees if it can prove particularly on the employer's side that the EEOC was unreasonable and acted unreasonably either with regard to the substance of the complaint or because it did not proceed with the necessary procedural pre-requisites to filing suit which in this case was conciliation and as I have indicated before conciliation is a necessary pre-requisite to the EEOC filing a lawsuit. Now, how much conciliation needs to occur and how reasonable the EEOC needs to be that's a different question and many of you who have had suits filed against you by the EEOC will know that its not a very high bar for the EEOC to get over in terms of what they need to do in order to have engaged in conciliation, but in this case, my feeling is that I think probably what is going to happen is the Supreme Court is going to indicate that $4.7 million judgment will be reinstated because I think the Supreme Court will find the EEOC's behavior in this case to be wanting. So if you ever have a situation where the EEOC is after your hide, pay attention to its efforts or lack thereof to conciliate the case as it is obligated to do under the statute.

Moving on, I wanted to bring to your attention something that I talked about a few times in the last several weeks which is the issue of employers being liable with a staffing company that gives them or supplies temporary employees as if they were a

dual employer. And this was a press release that was recently published by the Department Of Labor, obviously you all can go to the DOL's website, but let me review with you the salient points from this particular press release. So the press release begins by saying two Federal investigations found that temporary production line workers at J&J Snack Foods Corp., a leading North American manufacturer and distributor of popular food and beverages were significantly cheated out of their wages by the company and two staffing firms hired to provide the workers. They go on to say the US Department of Labor's Wage and Hour Division found J&J and the staffing firms denied minimum wage and overtime paid to workers as required under the Fair Labor Standards Act. As a result J&J, a repeat FLSA violator, has agreed to pay a total of more than $2.1 million in back wages and liquidated damages to 677 workers. Now remember under the Fair Labor Standard Act if you do not pay employees the appropriate wages, either overtime or minimum wage, under the Fair Labor Standard Act you are not only assessed the amount of wages that you owe that employee, but you can be assessed what is called liquidated damages or an equal amount of money, which is equivalent to the wages that you owe. So the press release goes on to say that the department's most recent investigation found 465 workers at J&J's Swedesboro facility provided by staffing firm Sebastian and Sebastian were paid straight time for overtime hours worked beyond 40 in a work week in violation of Federal Law. In response J&J agreed to pay a total of $1,260,000, 254 in back wages and liquidated damages to these workers. In addition the department assessed that $20,000 civil penalty to the willful repeat nature of the violations found in the latest investigation.

So hear is the salient point, in its investigations the department determined J&J jointly employed the temporary workers provided by both Sebastian and Pennpak that's the other staffing company. The FLSA states joint employment exits where workers have an employment relationship with one employer such as a staffing agency and the economic reality show that they are economically dependent on and thus employed by another entity involved in the work. When a joint employment relationship exists, we will hold those companies accountable when wage violations occur and workers are cheated. At the same time we are committed to educating employers and offering them the guidance they need to comply with the law and protect worker's rights. So, they go on to say in addition to payment of back wages and damages J&J is taking the following steps for a period of 18 months to ensure future FLSA compliance. These are things that you all should pay some attention to. 1) Include a written provision in all contracts with temporary staffing agencies requiring compliance with the minimum wage, overtime and record keeping provision of the FLSA. That is an important provision that you should have in any contract that you have with the staffing agency, that is to make sure that there is a representation, a contractual representation, by the staffing company or temporary staffing agency. That they will comply with all obligations not only under the FLSA, but under all other relevant Federal State and local employment statutes. Secondly, review a sampling of their temporary staffing agency payroll records at least four times a year to ensure payment in compliance with the FLSA. As you all know the problem is that when you are using a staffing agency, they are the ones, the staffing agency typically is the one that is paying the employee. So even though the employee is performing work at your facility or place of work, it is the staffing agency that is paying them based upon an invoice to you, you pay the staffing agency, which contains obviously a profit factor or an overhead factor through the staffing agency and they go

ahead and they make the paycheck payable to the employee who has worked for you. So you really want to make sure that there is a representation by the staffing agency that they are going to comply with the FLSA and all other relevant statutes and it would help to have some periodic examination of payroll and time records to assure yourself that there really is not any FLSA liability out there that you are unaware of. So this is just another example of the Department of Labor coming down on a company that is utilizing the services of a temporary or staffing agency there seems to be a major initiative of the Department of Labor. In fact, in the press release the DOL states these investigations were part of the Wage and Hour Division's "Temporary Help" initiative. So, be on the lookout for this stuff and I just make sure from a forewarning standpoint that when you are using these services, a) make sure there is a representation that will comply and even more important, and I think I mentioned this in the last telebrief, get an agreement on the part of the staffing agency to indemnify you in the event that there is any monetary liability as a result of a DOL investigation or other governmental investigation where it is determined that the employees have not been paid accurately, and obviously the indemnification is only as good as the financial wherewithal of the staffing agency or temporary agency or contractor that is supplying the employees, but it is an important provision that you should take a look at and if you need some help in that regard let me know.

Let me move on to a case that was just decided on December 18th, a week ago by the Fourth Circuit, in a case called Williams v. Genex Services, and this brings to light how claims for overtime frequently come up when the claim is by an employee who is asserting that rather than being exempt the employee is nonexempt; therefore, owed overtime. In this case, which arises out of a situation in Maryland, and the Fourth Circuit covers Maryland, there was an employee named Nancy Williams who was employed as a field medical case manager and she brought her lawsuit against Genex claiming that Genex was required to pay her overtime under the Fair Labor Standards Act and the Maryland equivalent to the Fair Labor Standards Act. Genex as a defense asserted that she was not entitled to overtime because she was employed in a bona fide professional capacity.

Now those of you who are familiar with the white collar exemptions under the Department of Labor rules and regulations know, that under the DOL regulations it defines a bona fide professional as an employee employed in a bona fide professional capacity as any employee who is compensated on a salary or fee basis at a rate of not less than $455 per week and whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. That is the official definition of the professional exemption under the FLSA. The DOL regulations go onto define primary duty as the principal main, major or most important duty that the employee performs and under the regulations as the court quotes—the termination of an employee's primary duty must be based on all the facts in a particular case with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include but are not limited to the relative importance of the exempt duty as compared with other types of duties, the amount of time spent performing exempt work, the employee's relative

freedom from direct supervision and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. Now keep in mind, at the present time the DOL regulations do not mandate that the primary duty be predicated upon an employee performing more than 50 percent of his or her time in the exempt position. But as you know, the Department of Labor has solicited comments and is changing the salary test for white collar exemption, which will be published sometime in 2016 and it may include some definitional change in how we look at the primary duty, but right now, courts look at a multitude of factors to determine whether the primary duty is exempt or not, only one of which is the amount of time that is being spent by the employee on the exempt duties.

So, in this case, in this Genex case, Genex claimed that Williams primary duty was the performance of work and requiring advanced knowledge in that she was a registered nurse and that she was responsible for controlling health care and disability costs, ensuring that quality health care was provided to injured workers and improving return to work rates, and they noted that her salary in 2012 was $83,354, a rather high salary which again would be one of the factors the courts look at in determining whether or not somebody is an exempt employee. They also looked at the job description for this particular person, which indicated that the plaintiff was responsible for assessment, planning, coordination, implementation, evaluation of injured, disabled and individuals involved in the medical case management process and that she was also responsible for developing individualized care plans that would assist the injured worker in returning to work. Putting all of this really into account the court of appeals, the Fourth Circuit agreed with the Circuit Court, the district court below, that she was a licensed RN and that she was performing work in a field of science that customarily is acquired by prolonged course of specialized intellectual instruction and so that they found that despite the fact that she may have performed nonexempt duties as well as exempt duties, nevertheless and even though there is a high burden for the employer to prove exemption that she met that exemption and they say in our view the district court did not err when it concluded that Williams' primary duty involved the performance of exempt work. They go onto say that the record evidence submitted demonstrates beyond question that Williams regularly uses her skills, training, and knowledge as an RN to perform her duties as a case manager. In other words, the record makes clear that her responsibilities performed with little or no direct supervision involved the consistent exercise of discretion and judgment as well as the use of her advanced nursing knowledge to analyze, interpret or make deductions from varying facts or circumstances and they go onto say the amount of time an employee spends on exempt work is not dispositive of whether the employee is a learned professional.

So this is the kind of analysis that courts will utilize in determining whether or not somebody is an exempt employee and they look at the nature of the duties that the employee performs, they look at the job description, which again I would stress is of critical importance in today's day and age when the private plaintiffs are bringing many of these misclassification suites where the claim is that somebody is misclassified as exempt when they are really nonexempt so you look at the duty, you look at the amount of time they do, you look at the job description, you look at the salary, obviously the higher the salary the more apt the DOL would be to find or a court would

find that the particular exemption is a bona fide exemption as opposed to an exemption with a bunch of holes in it. So it is a good decision. It pretty much lays out a roadmap for what you ought to be looking for when you have a question in your mind about whether a position is exempt or nonexempt, whether it is a professional exemption or an executive exemption or an administrative exemption. So you are looking at the degree of discretion and judgment as well as salary and duties.

The last case I wanted to bring to your attention again, a very recently decided case again by the Fourth Circuit, is a case called McKinnish v. Brennan and in this case the Fourth Circuit affirmed a summary judgment which was granted to the postal service in finding that the employee's subjective fears about potential retaliation did not excuse her or alleviate her duty to alert officials about purported misconduct constituting harassment on the part of her supervisor. So what happened in this case was that the plaintiff alleged that her supervisor exchanged sexually explicit text message and videos with her and that this created a hostile work environment and she claimed that she did not report this to United Parcel Service, UPS, because she was afraid of retaliation. What the Fourth Circuit said was that when the alleged harasser is the supervisor, an employer must show that it exercised reasonable care to prevent and correct any harassing behavior and that the employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Here, the court observed that the postal service had a strong anti-harassment policy that directed employees to report harassing behavior to employers, managers, or human resources personnel. If employees felt uncomfortable in making such reports, the policy further directed them to contact the union representative or ask a coworker for help. In this case, the court noted that the plaintiff never reported the alleged text messages, which were inappropriate to any supervisory employee of the postal service so that the postal service has no opportunity to cure the problem or to take appropriate action and the court went onto say that her subjective fears about retaliation did not excuse her from the obligation to report this harassment when there was a very comprehensive program in place and policy in place in order to cure and remedy and address complaints of harassment in the workplace. Now, it is important to note that under relevant law if she had sustained what is called a tangible job adverse action whether she was demoted or fired or her salary was reduced, the mere fact that there was a program in place or a policy in place would not necessarily protect the employer, but here there was no adverse action that was taken against her, therefore, the court indicated that as it was appropriate to do that her failure to even invoke the protective procedures setup by UPS would preclude a successful case against UPS because UPS never had the opportunity to address her particular harassment complaint or charges. So from a practical standpoint, it is incumbent upon all of you obviously and it is a good time of the year to do it to make sure that your harassment policies are as complete and comprehensive as they can be, that there is an avenue by which a complaining employee can file or articulate a complaint to numerous sources, whether it is to human resources or an executive, and certainly not somebody in the direct line of supervision if that person is the alleged perpetrator, and you want to state in your policy that employees have an obligation under your policy to report these things whether they are the victim or whether they are a witness. So make your policy as comprehensive as it can possibly be and you go a long way towards protecting yourself from a complaint of

harassment and the Fourth Circuit decision is simply indicative of that kind of protection that employers are afforded under Title VII when there is a complaint against them.

So, those are the developments for the day. As always I would invite any questions or comments. If any of you would like to do so now or if you want to do so privately, feel free to do so by responding to me by phone. My direct phone number is 410-209-6417 or by email at hkurman@offitkurman.com. Any questions or comments out there? Okay, well, it goes without saying that I wish everybody a happy holiday and a great happy, prosperous and peaceful New Year, and we will reconvene as I said on the second Wednesday in January, which is January 13th. So, thank you for your participation. Okay, take care everybody. Bye-bye.