LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning to everybody. It's Howard Kurman. Hopefully, everybody can hear me okay, I'm not in my office, but it should be okay. If we can't, let me know.

There's plenty to report today. I wanted to start off with a press release that was issued by the EEOC on May the 9th, and I'll read a little bit about it, and then I want to actually go into some detail because I think it may be helpful to those of you who have issues about extending leave or when a person is coming back from leave with a disability and what your obligations are, at least according to the EEOC. So on May the 9th, Equal Employment Opportunity Commission said today issued a new resource document, which addresses the rights of employees with disabilities who seek leave as a reasonable accommodation under the Americans with Disabilities Act. The document is titled Employer-Provided Leave and the Americans with Disabilities Act. I would invite all of you essentially to download this from the EEOC's website and as the EEOC says disability charges filed with the EEOC reached the new high in fiscal year 2015 increasing over 5% from the previous year. They go on to say one troubling trend the EEOC has identified in ADA charges is the prevalence of employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation. And they go on to say, providing employees with a period of leave for medical treatment or recovery can be a critical reasonable accommodation for people with disabilities. Now again, you can download the entire document from the EEOC's website, but this morning I wanted to highlight certain areas from this guidance that the EEOC has put out. Now remember, this is an EEOC guidance, it's not necessarily something that all courts will defer to in terms of everything that the EEOC has said, but they may. And so, for that reason, I wanted to make you aware of certain statements that are in this document, which is a fairly long document, but I would encourage you, particularly those of you who have responsibilities for ascertaining the ability of an employee to come back after a leave for what the job requires, all of you may want to take a look at this protracted and long document. So, let me go over some of the statements that they've made in this document.

The EEOC says employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave. The explanation proceeds, and it says, the purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave. And they go on to say an employer must consider providing unpaid leave to an employee with a disability as a

reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. I'll come back to that in a little bit. So, they give several examples, and one example is an employer's leave policy does not cover employees until they have worked for six months. An employee who has worked for only three months requires four weeks of leave for treatment for a disability. Although the employee is ineligible for leave under the employer's leave policy, the employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship. Another example, an employer's leave policy does not cover employees who work fewer than 30 hours per week. An employee who works 25 hours per week and who has not worked enough hours to be eligible for leave under the FMLA requests one day of leave each week for the next three months for treatment of a disability. The employer must provide unpaid leave as a reasonable accommodation unless it can show that providing the unpaid leave would cause undue hardship. They go on and provide other examples for those of you who have maximum leave policy. So instance, they say the ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship. And they include this example, an employer covered under the FMLA grants employees a maximum of 12 weeks of leave per year. An employee uses the full 12 weeks of FMLA leave for her disability but still needs an additional five weeks of leave. The employer must provide the additional leave as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship. They go on to say an employer will violate the ADA if it requires an employee with a disability to have no medical restrictions that is, be "100%" healed or recovered if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodation would cause an undue hardship.

Now, when they talk about undue hardship, and by the way they also talk about reassignment as an accommodation, when they talk about undue hardship, they list several factors that an employer would consider. One is the amount and/or length of leave required, for example, four months, three days per week, six days per month, etc. The second is the frequency of the leave, for example, three days per week, three days per month, every Thursday. The third is whether there is any flexibility with respect to the days on which leave is taken. For example, whether treatment normally provided on a Monday could be provided on some other day during the week. Another example, the impact of the employee's absence on coworkers and on where there are specific job duties are being performed in an appropriate and timely manner. There are other things that are contained in this long treatment, but I think the takeaway for all of you who have any responsibilities for evaluating the return of an employee from leave is that it really is an individualistic analysis based upon the particular circumstance of the employee, so if an employee has taken his or her 12 weeks of FMLA leave and may need two or three weeks additional to deal with the disability under the ADA you may very well have an obligation irrespective of the fact that the employee

has used up his or her FMLA leave to accommodate it. On the other hand if you get, what often happens, you get an amorphous or an ambiguous statement from a physician that says it is indeterminate when employee A may be able to return after the 12 weeks of FMLA leave, then you think you can make a very good argument that in that situation you do not have a duty to accommodate because it would impose an undue hardship on the individual employer to accommodate that particular disability. But the point is blanket policies which would otherwise prohibit the extension of a leave in a certain circumstance either because you have an independent policy that says you are only entitled to X amount of days or leave for a year or an FMLA policy that says at the end of 12 weeks if you do not return to work you will be terminated may not be applicable particularly if it is up to the Equal Employment Opportunity Commission. This is a kind of thing where courts probably would be somewhat differential to the EEOC's guidelines because it is a multifactored analysis that deals with the nature of the disability, the nature of accommodation, and the nature of any punitive hardship that would be imposed upon the employer, so I invite you to take a good look at, download this from the Equal Employment Opportunity Commission's website. It is worth reading and certainly if you have responsibility either direct or indirect for how employees are treated upon their return from their leave, I think you need to become familiar with EEOC's guidelines.

In a not a surprising turn, as I have been talking about this for weeks if not months, the Department of Labor finalized its rule on the change of salary for the white collar exemptions, which was issued late in the day on May 18, 2016. So, just to summarize for those of you, I am sure you have probably read this, but I will just summarize for you. The DOL raises the threshold from $455 a week, which was the old test going back many years, to $913 per week which comes out to about $47,500 per year, which may be $2500 less than what they originally thought. This was the grand compromise by the Department of Labor. The DOL justifies it by coming up with this level and saying that it is the equivalent of the 40th percentile of earnings of full-time salary employees in the lowest wage census region which is right now in the south of the United States.

Secondly, the DOL rules permit employers to include nondiscretionary bonuses and incentive payments which would include commissions to account for or be attributable for up to 10 percent of the new adjusted required salary level.

Thirdly, the DOL rules raise the compensation level for those in "highly compensated employees" to the annual equivalent of the 90th percentile of full-time salaried workers nationally, which currently is $134,000.

Fourth, in the draft of the DOL rules which were first published they wanted to update the salary and compensation threshold every year. The business community shouted loud and clear and as a result of that the DOL now under the final rule says that they will automatically update the salary and compensation threshold every three years.

Significantly, it was only a rumor that the DOL wanted to change the duties test. As you know, in order to be exempt as an administrative or an executive or professional employee, there is not only a salary test but there is a duties test as

well for each of those particular sub-classifications, and it was rumored for many weeks and months that the DOL would determine that they needed to change the duties test. For instance, in California in order to be considered exempt under the State California Law you have to perform 50 percent of your duties in an exempt classification. Well, the DOL backed off of that, and the final rule contains no other changes in the duties test beyond those which are enumerated in the FLSA regulations. So, we knew that these were coming. Rather than these regulations becoming effective immediately they will be effective December 1st of this year, and I think that it gives employers and you all out there plenty of time frankly to decide what you want to do, how you want to go about adjusting this, whether you want to convert existing exempt employees to non-exempt hourly employees. Remember, if you have an exempt employee that you are classifying as an exempt salaried employee and that exempt salaried employee is only making $38,000. Under the new rules, you would not need to adjust that unless you think that that person is going to be working overtime. If the person is going to be working overtime, then of course you need to treat that person as a non-exempt employee. But you need to really go through and you really as I preached numerous times before you take a good look at your workforce, good look at your exemptions, and good look at your job descriptions and determine what you want to do because there is a morale issue as I have talked about before in converting exempt employees to non-exempt in that they no longer have the workplace flexibility that they did and just the self-image as a professional exempt employee takes a hit once they are converted to a non-exempt hourly employee.

So, we are where we are, it is not a surprise. The only surprise was that the DOL at least in part listened to what the employer community was saying and made no changes in the duties test and minimally reduced the salary test from $150,000 to $147,000. So we are just going to see how this plays out, but I think in the end proactive employers again have between now and December 1st, which is plenty of time in order to adjust their compensation and salary level, and if you need some help on that I would be glad to assist you with that.

To show you how aggressive the Department of Labor is, I came across one of their press releases just last week, it was May 16, and it is interesting they say that the message that workers deserve to be paid what they are owed that is if an employer chooses to ignore that responsibility, we are serious about stepping in to make it right. Case in point, several years ago we investigated and they name it Enterprise Laundry Services in Chicago, and discovered that the company violated the FLSA's minimum wage, overtime, and recordkeeping provisions. Most employers in this situation take immediate steps to pay workers that they are owed and to put safeguards in place to make sure those kind of violations do not happen again. But since then this laundry company, and they name the owner, Margaret Matkowska refused to comply with three court orders to pay back wages and damages to 61 workers who had been shorted, fines for civil contempt are outstanding bringing the total amount owed to $249,426 and that is not even the worst of it. We discovered that Matkowska had spent $47,000 in corporate and personal fund since November by gambling and making large cash withdrawals at four casinos, sometimes even using corporate payroll accounts to pay for her gambling habit. Employers should know that we will use every tool available,

including litigation, to make sure workers receive the money they have rightfully earned.

I found this to be interesting because it is one thing for the DOL to come across and to essentially indicate to employers that they have cases pending and generally describe what those cases are. It is another thing to name the company, name the owner, name the specifics of what is going on, and I just think it is indicative of how aggressive this Department of Labor is, as well as the other employment administrative agencies like the EEOC and the NLRB and this is on a public press release. So talking about shaming an employer, this is about as bad as it gets. Again, I think it is indicative of the fact that the Department of Labor now, and of course, if we have another democratic candidate elected as president, it probably will continue for the next at least four years, so a word to the wise.

The last thing I want to mention is those of you who are covered by OSHA. On May the 12th, OSHA issued amendments to its recordkeeping regulations. And the new rule basically requires employers, that is large employers, that is employers with 250 or more employees that are non-exempt from OSHA's recordkeeping rules and high-risk employers, those are defined on OSHA's web site, that not only do they have to keep recordkeeping of injuries and illnesses, but the new rule requires that they annually submit these electronic injury and illness data reports directly to OSHA. So as opposed to the test where OSHA may have audited a company and requested this information employers now have an affirmative duty annually if they are covered under the provisions to submit electronic reports to OSHA and then also must now affirmatively inform employees that they had the right to report work-related injuries and illnesses to OSHA and without facing any kind of retaliatory action on the part of the employer. Pretty significant many of you may not have OSHA issues or may not be covered but for those of you who are pay attention to this it was just issued last week or May 12 and I am sure you can get the detail about the OSHA recordkeeping requirements directly on the OSHA website if you need further information.

The last thing I will mention is for those of you who seek to protect trade secrets from your employees on May 11, President Obama signed into law the so-called Defend Trade Secrets Act of 2016 and what this statute does is create a new federal private cause of action for trade secret misappropriation so that previously the remedy for trade secret appropriation on the federal side was a criminal statute. Now, in addition to the criminal statute there is a civil right of action that employers can't go after an employee who has misappropriated trade secrets, get attorney's fees, injunctive relief and damages. So it is a pretty significant statute, it has gotten a lot of play particularly among the employment bar and I think it is probably something that if you are dealing with an employee who you believe has gotten away or misappropriated important trade secrets it is one that your attorney can use as another sort of arrow in the arsenal against a departing employee who may have departed with valuable trade secrets. So again, this is something that may not concern many of you, but for those of you who have post employment agreements with individuals concerning trade secrets or expose employees to trade secrets this is something that you are going to want to become familiar with.

Okay a lot of stuff that I reviewed today as always any questions or comments are welcome. If you would rather do it individually my direct phone number is 410-209-6417, email hkurman@offitkurman.com. Any questions or comments out there?

Ann Barnes: Big stuff Howard, thank you.

Howard: Okay, anybody else if not I hope that we are in for some sunny days and a good Memorial Day because God knows I think we all deserve it that is for sure. And you know have a safe and a good Memorial Day and will reconvene on June 8th.