LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay it is 9:02 on my official clock and welcome everybody to probably what is an anticlimactic kind of telebrief after the events of last night and I would certainly confess that I had no idea it was going to happen but of course a lot of people that were a lot smarter than me did not either so I do not feel too bad about that.

Irrespective of one's political beliefs I do think that it is significant to try and prognosticate as to what might happen in the labor and employment arena in the next four years. What I was saying is that we do not know what will happen on a variety of fronts including for purposes of our call, the labor and employment front. As I have indicated on prior telebriefs as you well know many of the administrative agencies, which have been headed by pretty aggressive Obama Democrats, Department of Labor, Equal Employment Opportunity Commission, The National Labor Relations Board, may all change hands under a Trump administration. They may not but certainly the President has the opportunity to appoint who he wants to appoint because all these positions serve at the pleasure of the President. Particularly, when it comes to the National Labor Relations Board those of you who were attending putting on a program, two of my other colleagues are putting on a program next Tuesday at the Arundel Preserve, you know the big topics are what is going on at the Department of Labor and Equal Employment Opportunity Commission and National Labor Relations Board, those of you who want to attend and haven't signed up, Michelle who is on the phone can get you signed up. But in any event I do think it's noteworthy that we may see changes in direction in all of these administrative agencies dealing with the workplace that in the last at least four years and probably going on eight years have been very aggressively engaged in what I would call, in fairly I think hostile terms anti-employer philosophies and implementation and enforcement and I just do not know whether that will continue under a Trump administration or not. One would guess that that would not but I have guessed wrong all along what is going to happen in this campaign so I am the wrong person to ask. One thing that we now is that there is a vacancy on the Supreme Court, many of the cases that have been decided 4 to 4 during the time that we have had a vacancy on the court since Justice Scalia's death will no doubt have a new justice probably within a relatively short period of time since we have a Republican Senate and Republican President and I do not know what the philosophy of that person would be but of course it stands to reason that it would be much more in keeping with a conservative outlook than a more liberal outlook and for those of you out there in the workplace environment I guess if you

were to predict it would be more likely than not that you would have 5-4 decisions, which would probably be more employer oriented than employee oriented. But we just do not know at this point with so much up in the air and I think that it is one of these things where you just have to say stay tuned and keep your fingers crossed and with that I will not politicize or editorialize anymore because I do not want to offend anybody out in the hinterlands there.

Let me get to some substance because that is probably why you tuned in. I came across an article, which reinforced what I know some of my clients already do in terms of compliance and I do not know how many of you out there use an ethics hotline or a compliance hotline but I have several clients who do use these hotlines. Essentially what they are used for is for employees to register observations or complaints against fellow employees or supervisors or managers, they can even do it in anonymous fashion. So, those of you who have workplace harassment policies obviously create a mechanism by which employees can go to their supervisor or they can go to HR or any other executive and they can communicate these problems either in person, via email, by text, phone, etc. These compliance systems that are set up which utilize an ethics hotline or some sort of complaint hotline are valuable in that many times employees would prefer to make a complaint anonymously. Now, it does create some issues of how do you follow up with a person who has made a complaint anonymously, but it does seem to work out in many cases and I have had clients who particularly use them as a means of getting information and then starting an investigation. Most of these hotlines work on the premise that they are available 24x7 and that any time of the day or night if somebody wants to make a complaint they can do it, they are funneled in electronically to a certain source whether that source is in HR or some other compliance kind of an officer and in some cases these are actually run by a third party, an independent third party who will run the hotline and give the appearance and perception to everybody that there is more objectivity associated with this kind of hotline. And they are not expensive to run, they really are not, it is not as though you are spending $100,000 a year to have one of these compliance hotlines. Obviously, if you have one or if you are thinking about setting up one certainly you need to understand that it does create a call for action. After all, if you get an anonymous call or even if you get a call from a named employee it then becomes your legal duty to investigate and to follow up and to make sure that you get as much information as you can to either refute or to substantiate the kind of complaint or charge it's made. So I bring it up if you are looking at, now particularly for the new year, if you are looking at your workplace investigation and harassment policies this would be a good kind of thing to consider if you are large enough to contemplate employees who may not exactly be comfortable coming into HR to make a complaint or talking to their supervisor but who may otherwise be more comfortable in registering perhaps an anonymous

complaint on an ethics or a complaint hotline. And again, it is really not an expensive proposition if you are interested in doing it, so I think that you may want to think about that.

I also came across an interesting article because we all hear about the gig economy today and what it is and what it is not, and what its practical impact is on many of you out there. I was not really even sure that there was a common definition of a gig economy but in this article I came across it basically states the definition put out by the Congressional research service and that definition is as follows: "The gig economy is the collection of markets that match providers to consumers on a gig or job basis in support of on demand commerce. Gig workers enter into formal agreements with on demand companies to provide services to the company's clients. Prospective clients request services through an Internet-based technological platform or Smart phone application that allows them to search for providers or specified jobs." The article goes on to quote some interesting statistics. So I'll quote it says industry-wide data is sparse but studies by the future of work initiative in Time magazine have found that in the United States 44% of adults have participated in on-demand transactions and 22% or 45 million have offered some kind of goods or services as part of the gig economy. An estimated 600,000 workers or 4.4% of the US workforce regularly work through an online gig economy platform, so when we are talking about you know these gig companies, I will just name some of these that I am sure you have heard of, Uber, Caveat, Sam Source, Skype, etc. The interesting thing about this gig economy that the article goes on and it cites statistics indicate that the independent contractor classification is becoming more widespread with the IRS receiving $91,000,000 in 1099 forms in 2014, an increase of more than 10% from the 82 million it received in 2010.

So as we have talked about it in the past it is interesting that you couple this gig economy movement with the issue of employee versus independent contractor misclassification issues and in many of these companies particularly as you know in Uber they have faced and are facing class-action lawsuits on the basis that the drivers for Uber are inappropriately classified as independent contractors as opposed to employees. And I guess as the so-called gig economy becomes more prevalent these issues will come more to the forefront either in an IRS setting, a Department of Labor setting or even an EEOC setting. So, an interesting kind of an article and I think probably portends a lot more attention to the so-called gig economy.

I wanted to bring you up to date on a development that occurred just about a week and a half ago another announcement by the White House, which issued what is called a call to action for states to again limit and perhaps eliminate non-compete agreements. We know that in California,

Oklahoma and North Dakota they are outlawed but in other states they are not. As the White House stated in this announcement a week and a half ago, they said non-compete agreements should be the exception rather than the rule and there is gross overuse of non-compete clauses today. In the announcement the White House went on to say that states should legislate and/or limit the use of non-compete under the following circumstances. So the White House indicated that states should take a look at banning non-compete agreements for particular categories of workers such as workers who do not make over a stipulated wage, workers who are in certain defined occupations and workers who may be laid off or terminated without cause. Now, I think I have stated to you in past telebriefs it goes without saying I think from a common sense standpoint that you need to take a look at who you are asking to sign non-competes with anyway. Some employees, clerical employees or low-level employees see very little need to have a non-compete agreement with as opposed to an executive or a high-powered salesperson. The White House also indicated that it would recommend to states that with regard to non-competes they improve transparency and the fairness of non-compete agreements by requiring employers to disclose non-competes before a proposed job offer is accepted or before a significant promotion has been accepted within a company even once an employee is on staff. And the other recommendation of the White House in this was to incentivize employers to write enforceable contracts by basically stating that if a non-compete is part of an employment agreement, which is overbroad in terms of either geography or duration that the entire employment agreement should be struck down rather than the offending provision in the non-compete. Less you think that this is simply an isolated federal statement. I would say that on the same day that the White House announced this initiative New York's Attorney General announced that he plans to introduce legislation in 2017 to curb the use of these non-competes and to "him he says the new bill promises to" curb the rampant misuse of non-compete agreements which depress wages and limit economic mobility by banning workers from employment at a competitor for a mandated period after leaving a job. New York does not have current statutes regarding the use of restrictive covenants so it is just a question of common law, but it is interesting what he is proposing under this bill. So the bill would prohibit employers from using non-compete agreements for low-wage workers in particular for those who earn less than the administrative and executive exemption salary thresholds. Now, the legislation would require employers to provide prospective employees with non-compete agreements before extending a job offer, the bill would require employers to pay employees additional compensation if they sign non-compete agreements, if passed the law will restrict employers use of non-compete agreements that are broader than are necessary to protect the employer's trade secrets or confidential information. And it also limits the time duration during which the non-compete would be effective.

You know I have spoken about this on prior telebriefs and it just does seem to me to be a trend among many different states that are looking skeptically at the enforcement of non-compete agreements. You can still have them and in the state of Maryland they are still recognized as long as they are reasonable in duration and geographical scope and as long as they do not impose an unreasonable burden on the departing employee or affect the public interest in some manner but I have to tell you I mean I deal with these issues all the time with clients and you know my best advice is use them judiciously. There is no need to use them for every employee in your company and also as an alternative always consider the use of a non-solicitation agreement, which would preclude the departing employee from soliciting clients or customers as opposed to competing in the same business that the employee was engaged in while with you. Non-solicitation agreements are a much more readily enforced by courts than are non-competes. You also can have confidentiality and non-disclosure agreements, which also are respected and regarded by courts generally as being a reasonable restraint on the employee's opportunity to disclose confidential or proprietary information belonging to the company. So you do not always have to hit you know the flee with a hammer you can accomplish other things with regard to post-termination restrictions in a less kind of aggressive manner depending on the facts and circumstances of your particular situation.

I wanted to point out a case that was decided by the Fourth Circuit just on October 31st, you know a week and a half ago, kind of an interesting case dealing with the FMLA. It was published in BNA and I will probably quote from some portions directly from the summary but it says United Airlines, Inc., did not violate federal law when it fired a worker for allegedly misusing medical leave during a vacation in South Africa and Italy and later lying about it. The case is called Sharif v. United Airlines again decided October 31, 2016 by the Fourth Circuit. So the court in the summary says: "Mr. Sharif who had been approved to take intermittent leave under the Family and Medical Leave Act because of an anxiety disorder failed to show that the airlines stated reason for his discharge was a guise for FMLA retaliation the US Court of Appeals for the Fourth Circuit held October 31st." A quote from the court's decision, "the evidence taken as a whole plainly paints a picture of an employee who used FMLA leave to avoid interrupting his vacation and then gave a variety of inconsistent explanations for his behavior upon his return." The Fourth Circuit said affirming the dismissal of Sharif's claim. The summary goes on to say "the decision continues a trend among courts to generally side with employers in so-called FMLA abuse cases." United Airlines won a similar case in 2014 against a flight attendant who purportedly called out sick from Taipei for shifts in Denver that preceded a month-long vacation. I think this is not groundbreaking in terms of it

making new law. There is ample justification for those of you out there who have people that are on FMLA leave and where you get wind that the FMLA leave is illegitimate because the employee is off doing something either on a recreational basis or on a work-related basis or is doing something, which is inconsistent with the purported FMLA leave and even the Department of Labor FMLA regulations will indicate very clearly that employees who abuse FMLA leave or who are doing things, which would result in discipline or termination even if they were not on FMLA leave are not immunized by the fact that they are on FMLA leave. So, if you have good faith information about an employee who is on FMLA leave that it is being abused in some form or fashion, you investigate it and corroborate it and substantiate it, do not be afraid just because the person is on FMLA leave of taking corrective action up to and including termination. Now, of course if you are contemplating termination you got to be pretty careful about that and sometimes it is helpful to talk to counsel before you do that. All right well those are the developments for the day which pales significantly in comparison with the developments of last night and early morning but anyway, Michelle if you can take it off mute please.

Okay as always I am happy to answer any questions or comments that you may have and I think that you know some of you may just be so bleary-eyed from last night that you cannot think, but if you are thinking and you have any questions or comments let me know. Okay it looks like everybody is going to get that second cup of coffee or third cup of coffee but anyway enjoy your day to the extent that you can enjoy it and we will talk again in the fourth Wednesday in November and if I do not talk to any of you again have a great Thanksgiving.