LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay we are going to get started. It is 9:02 on my clock. Michelle if you can put this on mute and we will dive right into this. All right good morning to everybody. I cannot believe that it is Thanksgiving Eve and you know here we are almost into December. So welcome to our twice a month telebrief, and I am going to get started because there is a lot to cover this morning.

For those of you who do not know big news for the Department of Labor or coming out of the Department of Labor on two fronts. Probably, the most important one for all of you out there is that late yesterday afternoon a federal district court judge in the District of Texas, Judge Amos Mazzant granted a temporary national injunction against the enforcement of the Department of Labor white collar revision salary rules, very significant development.

As you know, I have been reporting in prior telebriefs not only on the substance of the new Department of Labor rules, which would have increased the salary exemption or the salary test from $24,000 and change to over $47,000 and change effective December 1st; only what a week and a half from now so to speak. But the number of people that this would have affected in the workplace was significant and what happened was the 21 States filed a lawsuit seeking to enjoin the enforcement or the implementation of these new rules and it was joined by the Chamber of Commerce and other business groups as well. Lo and behold last week there was a hearing before Judge Mazzant, and Judge Mazzant heard from all sides and indicated that he would submit his ruling on this by November 22nd, which was yesterday. Late in the day, in fact, he entered a preliminary injunction, which would preclude the enforcement nationally of the new Department of Labor rules pertaining to the salary adjustment. As he indicated in his decision the court determines that the state Plaintiffs have satisfied all prerequisites for a preliminary injunction, the state Plaintiffs have established a prima facie case that the department's salary level under the final rule and the automatic updating mechanism are without statutory authority. Remember under the Department of Labor rules not only was there an adjustment in the immediate salary to take effect on December 1st, but as part of the Department of Labor rules, there would be an automatic indexing or adjustment that would occur every three years beginning with 2020, which would be predicated upon certain indexed data on the cost of living. That is also out the window at this point. Judge Mazzant went on to say in his decision Congress defined the white collar exemption with regard to duties, which does not include a minimum salary level, with the final rule the department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test and he goes onto say due to the approaching effective date of the final rule the court's ability to render a meaningful decision on the merits is in jeopardy, therefore, a preliminary injunction preserves the status quo while the court determines the

department's authority to make the final rule as well as the final rule's validity. The Department of Labor, no surprise, stated we strongly disagree with the decision by the court, which has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans. The department's overtime rule is the result of a comprehensive inclusive rule making process and we remain confident in the legality of all aspects of the rule. We are currently considering all of our legal options. So where we are is we are in the twilight zone. Many of you out there probably have taken affirmative steps to adjust your salary levels for exempt employees from whatever they were under $47,400 to that level. But of course now, with the preliminary injunction you are not obligated to do it at least for now. The problem is that from an employee relation standpoint many of you have probably had discussions with your employees; you have communicated the fact that changes are going to occur and now that's all up in the air pursuant to Judge Mazzant's decision. Remember procedurally this is at a preliminary injunction stage and what there will be is further hearing on whether the preliminary injunction should be converted to a permanent injunction. And frankly, even if a permanent injunction is not granted, I believe there is a more than 50-50 chance that something will be done in Congress because remember we have a Republican house, we have a Republican Senate and we have a Republican president. As you know, even before this decision came about, there was an act passed in the House of Representatives, which would have delayed the implementation of this white-collar change for a period of six months. Of course, it never went anywhere because the Senate was controlled by the Democrats and we had a Democratic president. Now, the political landscape has changed. Again, we have a Democratic House of Representatives; excuse me, a Republican House of Representatives, Republican Senate, and a Republican President. And so even if we do not have the upholding of this injunction down the road or the conversion of a temporary injunction or preliminary injunction into a permanent injunction it is likely that this will be addressed legislatively in Congress. So, if you are out there and if you would prefer not to implement these changes at this point you are certainly not obligated at this point to do that pursuant to a national injunction, which has been issued. On the other hand if you have already given notice and you have already taken steps to implement it, it's not like you are going to be hurt by implementing it, except that if the rule is eventually permanently enjoined or if there is some modification to it, you could roll back whatever changes you make again with the caveat that it may create some employee relation issues for you.

So, this is big news. As you know, this has been going on since 2015 when President Obama mandated that the Department of Labor undertake a study to increase the salary exemption from $24,000 to what the Department of Labor subsequently determined in the preliminary rule would be $50,000 and then rolled back to $47,000. So, it is up in the air as to exactly what is going to happen, but I think it is safe to say that it will be addressed judicially in the form of either a permanent injunction or it will be addressed legislatively in Congress and by the President in terms of some modification probably of either the salary

level and/or the doing away with the automatic indexing, which had been hypothesized and then effectuated by the Department of Labor in its final rule.

` While we were talking about the Department of Labor, it has not been a good week for the Department of Labor because in addition to a preliminary injunction being granted against the enforcement of the Department of Labor's white collar exemption rules, there was a permanent injunction again issued by a different Texas federal judge enjoining the United States Department of Labor from implementing it's so-called persuader rule, and I have talked about the persuader rule in prior telebriefs. It essentially would have required both employers and their attorneys to disclose fairly sensitive financial information in the midst of a union campaign about what services were being rendered in an antiunion campaign, which was effectuated by an employer and/or its attorney in the form of advice. This was attacked in a lawsuit, which was brought in a Federal District Court in Texas, and low and behold, last week United States District Judge Sam Cummings granted summary judgment to Texas and nine other states and business groups to invalidate in total the Department of Labor's rule on the persuader rule adjustments that the Department of Labor greatly wanted. As the court said the court is of the opinion that the Department of Labor's persuader advice exemption rule should be held unlawful and set aside. The court's preliminary injunction preventing the implementation of the rule should be converted into a permanent injunction with nationwide effect. Not only that but Judge Cummings also issued a show cause order in which he was asking for briefing on the issue of whether or not attorney's fees should be assessed against the Department of Labor in its attempt to enforce this persuader rule. So, when I say that the last week has not been good for the Department of Labor I am telling you that is an understatement, that the department suffered bitter defeats on two fronts. And we know that under the new Trump administration, the head of the Department of Labor, the Secretary of Labor Tom Perez will certainly not remain as the continued Department of Labor head and in fact there will be a Republican appointee so many of the initiatives that were brought to bear by Tom Perez and during the last eight years under the Obama administration I am sure will be modified in fact in some cases negated by a new Department of Labor administration. So stay tuned on that for purposes of the white collar exemption rule that is the most important thing that we have facing us and at least it is a favorable decision on the part of employers.

Turning our attention to the EEOC, I wanted to bring you up-to-date on a press release that was put out a couple days ago by the EEOC. It is entitled EEOC issues enforcement guidance on national origin discrimination. And on this press release, which you can find on the EEOC's website, it stated that the US Equal Employment Opportunity Commission has issued its updated enforcement guidance on national origin discrimination to replace its 2002 compliance manual section on that subject, the federal agency announced today meaning November 21st, which was just a couple of days ago. The press release goes onto say EEOC is dedicated to advancing opportunity for all workers and ensuring freedom from discrimination based on ethnicity or

country of origin said EEOC chair, Jenny Yang. This guidance addresses important legal developments over the past 14 years on issues ranging from human trafficking to workplace harassment, and I will just highlight some areas that you can find again on the website, but which I think is important. So, on the website and on its guidance, the EEOC says generally national origin discrimination refers to treating an individual less favorably because he or she is from a certain place or has the physical, cultural or linguistic characteristics of a particular national origin or ethnic group or using an employment policy or practice that disproportionately impacts people on the basis of national origin and is not shown to be job-related and consistent with business necessity. Question under this, which they address – Does Title VII protect an individual from discrimination based on a perception of national origin even if the perception proves to be incorrect? The EEOC's answer yes; Title VII prohibits employers from discriminating based on incorrect information or conclusions about an individual's ethnicity or nationality. For example, because of the perception that he is Hispanic or Latino would be a national origin discrimination even if he is not in fact Hispanic or Latino. Question, which is addressed on the website – Can applicants or employees allege Title VII employment discrimination based on national origin and another basis such as race, color, religion or sex? The answer yes. In fact, national origin discrimination often overlaps with other forms of discrimination such as race, color or religious discrimination. A person could challenge discrimination based on combination of protected characteristics that are inseparable often referred to as—and this is a term for your sort of filing away—intersectional discrimination, that is for example, Title VII prohibits discrimination against an employee because she is an Asian woman even if the employer is not also discriminated against Asian men or non-Asian women. Question – Can victims of human trafficking also allege national origin discrimination? The answer yes. Title VII applies to trafficking cases when an employer uses force, fraud or coercion to compel labor or exploit workers based on their national origin or another protected classification. There are many other questions, which I will refer to your reference to on the EEOC's website. I bring this up because it's apparent to me that at least according to what was stated by Trump during the campaign there may be concentration on different ethnicities, national origins, etc., and I think they are going to have to be careful at least from the EEOC standpoint regarding this kind of alleged discrimination that may be more prevalent in the next four years at least under the new administration.

Turning my attention just briefly to the National Labor Relations Board there was a hearing at the DC circuit on the big case coming out of the National Labor Relations Board called Browning-Ferris, which is where the National Labor Relations Board had determined that unlike in the past it was changing the test to determine whether an employer would be deemed to be the joint employer of another entities employer, so for instance if you engage or use the services of a staffing agency, the National Labor Relations Board would say under Browning-Ferris that even if you only indirectly control the terms and conditions of the people that you get from the staffing agency, you could be deemed to be the joint employer of that staffing agency thus subjecting you to the risk of

union organizing or liability for unfair labor practices committed by that staffing agency. I think that the DC circuit is liable to overturn the National Labor Relations Board decision in Browning-Ferris, and probably return to the old test which was you would only be deemed to be the joint employer of an employee if you had direct control over the terms and conditions of that employee as opposed to indirect control, and I think that that's a decision that may be likely by the DC circuit. The reason it is important is the EEOC has also weighed in on this and indicated in its pronouncements that it favors the National Labor Relations Board test for dual employment, which again I think is an unworkable test when you are talking about indirect control and I think that we would all be favorable towards a Second Circuit decision, which returned us to the days of direct control rather than indirect control over the terms and conditions of employment.

As we turn our attention to January 20th and the inauguration of Donald Trump, I think that we will likely see a rollback of many of the executive orders coming out of the Department of Labor, OSHA, etc., that were deemed to be extremely employer unfriendly whether they will be complete rollbacks or not we do not know that you know it is yet to be determined, but I do think that from the standpoint of prognostication it is likely to see that many of the things that were overtly anti-employer, particularly coming out of either the Department of Labor or the National Labor Relations Board are likely to be modified to some extent, if not completely rolled back or rescinded under a Trump National Labor Relations Board, Department of Labor, EEOC, etc. It does not mean that you should modify your policies to such an extent that you now, you know, put yourself or your company at risk because of you your feeling that the Trump administration will be very, very pro-employer, but it does mean that hopefully we will move towards a more balanced treatment of employers in the workplace, which for the last four to eight years has been anything but balanced under the Obama administration. So those are the developments, significant ones at that, in the last week to two.

Michelle, can you take this off of mute?

Okay I know there may be questions. I am happy to answer those questions from anybody out there either in this forum or in a private phone call. My number is (410) 209-6417 or an email hkurman@offitkurman.com. You know the labor issues are significant and those of you who have questions, I would be glad to answer them. The next telebrief, just a reminder, would be the second Wednesday in December, which would be, December 14th. Any questions or comments from anybody out there?

Anne: Howard, this is Anne. I was wondering with the preliminary injunction when the next set of changes comes up, for instance, when does it go back to court or is there a timeframe on that?

Howard Kurman: Well what will happen is that now that a preliminary injunction has been issued, there will be a hearing scheduled. There may be evidence taken on whether or

not the preliminary injunction would be converted to a permanent injunction. That may take some time. I do not know what the court's idea is on scheduling that but in the meantime between the time of the preliminary injunction and the time that a final decision is issued, of course, the preliminary injunction is the law of the land. So Anne if I get information on a more definite schedule, I will certainly bring that up in the next telebrief, but right now I do not have any more specific information.

Anne: Okay, thank you.

Howard Kurman: Sure. Any other questions?

Mike: Hey Howard, do you know any realtors in Texas?

Howard Kurman: I don't, but I am sure that there are people out there including you, Mike, who may be looking at that.

Mike: Hey, maybe Jim can help us, remember Jim?

Howard Kurman: I sure do, Jim Carroll. You know, look it is not a surprise that we have gotten these decisions from Texas court even though it's a Federal Court because it's a pretty employer friendly forum and jurisdiction, thank goodness. Questions or comments?

Howard Weinstein: Howard, good morning, this is Howard Weinstein. Quick question for you.

Howard Kurman: Hey Howard.

Howard Weinstein: Hey, quick question for you, this is a perfect example of why you should never get things done early, but I missed the ruling. Is there any risk for employers, myself included, that got ahead of the curve and started communicating these changes to their employees, albeit with an effective date of December 1st and there is some significant cost associated with this for us if I rollback the change now because of the injunction _____.

Howard Kurman: Howard, I do not think that there is legal risk. I think what you have is you had an employer relations issue that needs to be managed, but until and unless, until and unless there is a, you know a, continuation of the Department of Labor rules we are in a situation where you are not under an obligation to enforce it. So whether and to what extent you want to roll back that is up to you with I think just employer relations issues; and you know if you want to do that, you can explain that, you know there has been a change in the law again and that unless and until the Department of Labor's mandate is re-implemented or reinforced the status quo is going to be maintained. So I do not think it is a legal issue, I think it is an employer relations issue.

Howard Weinstein: Howard, even in the concept, the context where I believe the Fair Labor Standards Act requires that we provide employees with a couple of weeks

advance notice when there is going to be a wage reduction, would that trigger this, even though I have not put the wage increase into effect?

Howard Kurman: No, I do not think so because you have not put into effect, Howard. So it is not like you are reducing anything. Had you put it into effect there may be an issue but if you have not, I do not think you have a problem.

Howard Weinstein: Okay, I probably got well over a hundred employees that we are likely to…we are going to meet on today and likely roll back.

Howard Kurman: Yeah, well you know Judge Mazzant did you guys a favor.

Howard Weinstein: Thank you.

Howard Kurman: Yeah, you know, and if anybody wants, you know, I intend to get a copy of the decision, anybody who wants it, just send me an email and I will send it to you.

_____: Hello.

Howard Kurman: Yeah, anybody have a question?

_____: Yeah, I have a question, so this week is actually the beginning of our payroll period for the December 1st pay. We have many people who have started the process of clocking in and out. Since they have already actually made a change to their schedule, there is no danger is us saying, I mean essentially never mind.

Howard Kurman: No, I mean, again I think you just have to manage your communications if anything, you know, employees may say what the heck are you doing? You know, you tell us this, then you are revoking it, I just think it has to be managed and I think you have to be careful about how it's communicated, and I also think you have to communicate to your employees and this goes to your question Howard. That look this may be modified again in the future, but for now, you know, we are in a situation were you can roll it back if you want.

_____: Thank you.

Howard Kurman: Sure. Okay, well, I am glad that we are able to bring you some decent news for a change, and we will talk again on December 14th. I am sure I have more information on it then and, you know, if there is any questions in the meantime, feel free to get in touch with me. By the way, I meant December 14th not December 8th. So everybody have a good Thanksgiving and we will be in touch.

_____: You too.

_____: Thank you Howard.

_____: Thank you.

_____: Thank you Howard.

Howard Kurman: All right, take care, bye.

_____: Thank you Howard.