LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Alright, good morning everybody. This is the last telebrief in January and the month just rolled by.

So, without further adieu I wanted to spend some time this morning talking about at least the high points that I see in the Maryland Healthy Working Families Act, which was, as you know passed in an override of Governor Hogan's veto from the act last year that was passed by the legislature. Many of you have probably read this particular piece of legislation, I have read it many, many times. I think it is not the best work of the legislature and I think that it will create as many questions as it answers and I do know that there is a movement afoot to extend the period of time within which companies have to abide by and enact relevant changes in their leave laws, right now your are supposed to be in compliance by February 11th which is just a few weeks from now. My guess is that, that's going to be extended out probably 60 days or so. I think it was unrealistic to expect that in a complicated bill like this that employers would be able to comply within a matter of days and week of the time that it is enacted, just did not make any sense to me. In any event, I'm not going to certainly read the statute, I'm not going to cover every detail of it, but I wanted to sort of cover the highlights of what I think are the relevant parts of the statute, I would mention that two attorneys in our labor and employment department, Russell Berger and April Rancier are going to be conducting a webinar on this tomorrow and those of you have registered, great; if you haven't you can register through Michele Correnti who is also on this phone. Okay, so let me try and cover some of the high points and then we move into some other areas as well in the remaining time.

First, there are supposed to be regulations, which are promulgated and communicated by the Commissioner of Labor. Those have not been promulgated nor has there been a poster which has been created nor has there been a sample policy created as yet. So, stayed tuned for that, but that is the responsibility of the Commissioner of the Department of Labor Licensing and Regulation. So the Healthy Working Families Act essentially is enacted to require that all employers of 15 or more employees pay sick and safe leave during a year or allow it to accrue and so let me go through and sort of chronologically through the statute, point out the high points as I see it. First of all, family member in the statute is very broadly defined. So whether it is a child of an employee, whether it is a parent of an employee, whether it is a spouse or grandparent, grandchild or sibling all these are covered when it comes to permitting

sick and safe leave of the employee. And so you have to kind of look at the statute but they are very broad definitions of all of these terms contained in the statute. In terms of your existing policies, many of you already have obviously paid leave whether it is classified as vacation, sick leave or even any kind of personal use or personal leave days. And you can maintain that classification of leave as long as you are allowing your employees to accrue at the rate that is mandated in the statute which is one hour of paid leave for every thirty hours of work that an employee engages in during the year. So many of you obviously have leave policies that would be more generous than that which is mandated under the statute and that is permissible under the statute and you wouldn't have to make any change in your accrual rate assuming that you want to maintain your present rate of accrual. So you are going to have to actually do your math and if it is more generous than one hour of leave for every thirty hours of work then you would be okay, but nevertheless under the Maryland statute because the leave has to be able to be used for all of the mandated purposes which are set forth and I will get to that in a minute, you are going to have to notify your employee, so, you know, you can sort of put this act into two buckets. One is what I would call the substantive part of the statute. What you require to do substantively to give or provide for leave for employees. The other bucket is what I would called the procedural aspects of the statute, which are the notice requirements, the record keeping requirements, communication requirements, etc., and both of those may be new to you and both of those you are going to have to pay kind of close attention to and mirror the words of the statute itself. Keep in mind that this statute does not apply to any employee who regularly works less than 12 hours a week for you as an employer. So, you know, part time employees are included, but they are only included if they work more than 12 hours per week and obviously an employer that employs 14 or fewer employees would not have to pay or provide for paid leave, but I suspect that most of you on this call are in the category where you are going to have to provide paid sick leaves. So, other substantive requirements of the statute of note. First, you do not have to provide for more than 40 hours of earned sick and safe leave in a year but you do have to provide up to 64 hours of accrued leave to be able to be used during the year, so essentially what the legislature is saying is, you got to provide for five paid sick days and the employee can accrue, of course if its unused you have to allow the employee to carryover in any one year from one year to the next up to 40 hours of the accrued but unused paid sick and safe leave. That is why they are saying that you can use up to 64 hours of earned sick and safe leave in a particular year. You do not have to allow the employee to use any of this during the first 106 calendar days that the employee works for. You might say, well, how did the legislature come up with a 106 days and I think the evidence is that that related to those companies who employ students or people during the summer vacation and didn't want to get stuck with having to accrue or pay safe and sick

leave during that period of time. You also can award under the statute the entire allotment of the 40 hours at the beginning of a year and if you do that you don't have to allow the employee to carry over any kind of safe and sick leave at the end of the year. So, some of you may want to allot the full 40 hours of leave at the beginning of the year, you may do that anyway under your present leave policy. In any event the employee begins to accrue as of the first day of employment even though he may or he or she may not be able to use it until after 106 days of employment is done. It's important to note that this is not a terminable benefit under the statute. So, in other words any unused sick and safe leave that an employee may have at the time of termination is not required to be paid out unless of course you want to pay it out as a matter of employee relations or your own policy, but the statute does not require that you allow it to be used and if an employee uses more than has been accrued, so some of you may allow an employee to, so call, take an advance of the actual time of accrual, you can recoup that assuming that you have an appropriate wage deduction authorization which has been executed by the employee under the statute and which would allow you to recoup at the end of employment any over payment essentially of sick and safe leave that the employee has used before actually earning it. Now, from a notice requirement, the employee is obligated to provide notice under the statute. Its interesting to at least hypothesize is this going to impinge on the employees privacy rights because the employee is obligated to let you know for what purpose the employee wants to take this sick and safe leave. I don't know that the legislature has really thought this out because the employee in providing the notice at least ostensibly has to give you some notice of what it is being required for, whether it is for the employee himself or a family member, etc. And I assume the regulations will probably deal with these, but as I said there are no regulations at the present time. So the employee is required unless there is an emergency situation or other mitigating factors give you seven days notice of the reason for which the employee is taking the leave. From also a procedural stand point, you are required to have the leave policy in your handbook or in a stand alone policy itself and you are obligated to provide notice to the employees as to the purposes for which they can take this leave under the Maryland statute and so even those of you out there and I suspect it's the predominant majority of you out there who have existing leave policies are going to have to amend the language so that you mirror the language in the Maryland statute to provide that employees can take leave after the purposes which are enumerated in the Maryland statute. So as I said this falls into the procedural bucket that you are going to have to comply with even if you have existing liberal leave policies at the present time. And I think that there will be a lot of confusion as to how you word those policies and really those of you who have existing policies may want to just have one policy in the future for compliance with the Maryland Sick and Safe Leave law and one for your other existing leave or you can sort

of conflate your existing leave law with the Maryland Safe and Sick Leave requirement. Whatever you do you are going to have to pay very close attention to the requirement of the particular statute, how you word your leave provision and how you notify your employees and that's why I am saying I do think that there will be a grace period within which the legislature now will provide for all of you having to comply with a statute because there are penalties under the statute for noncompliance which mirror those under the existing Maryland Wage Collection and Payment Law that is if you don't comply the employee can sue you or initiate a complaint and the penalties for noncompliance are treble damages and attorney's fees which you don't want to get engaged in. So there is plenty really to take a good look at under this statute. The regulations may be of help, the sample policy may be of help and even though I think you won't have to technically comply by February the 11th I do think that you really need to start to prepare right now and I think that from the standpoint of the impact in Maryland, it is estimated that this would impact 100,000 businesses employing almost 800,000 employees in the State of Maryland. So again there will be a webinar that you know two of our labor and employment attorney's are putting on tomorrow but I think that the 30,000 foot level is that you are going to have to look at your existing policy, you are going to have to make sure that you communicate to your employees the purposes for which leave can be taken which mirror those under the new statute and procedurally you have to keep records for three years under the statute, you are going to have to notify employees through your payroll system of how much leave they have taken, how much leave they have left for the year. So there are a number of procedural and substantive requirements and I think that this was a much more complicated act than was really necessary for purposes of providing for leave under certain circumstances. I think it was overreaching by the legislature but that is my editorial comment.

Right I am going to move on and cover a few other things that I think are significant as well. So two weeks ago President Trump selected a management labor attorney from Morgan, Lewis and Bockius a large law firm in DC named John Ring to fill the remaining vacancy on the five-member National Labor Relations Board. He took the place of the acting chairman Phil Miscimarra who resigned and again this maintains a Republican majority on the National Labor Relations Board. Assuming that Mr. Ring will be confirmed which he will be again there will be a three to two majority on the National Labor Relations Board which again in my opinion will redound to the favor of the management side of the labor equation. There are many cases that were communicated and passed by the Obama Administration which I think will be modified or reversed by the Trump National Labor Relations Board. One significant development is the so called Purple Communications Rule which was a 2014 Obama Board decision and it has impact on non-union employers as

well. You may recall I talked about this last year in my telebriefs. The Purple Communications Rule from the Obama Administration says that those employers who allow access to their email systems by employees which are virtually all employers in today's day and age and virtually all of you out there who are attending this. That in those situations where you allow employees access to your email systems you have to allow those employees access to the email systems on their non-work time for purposes of even organizing or communicating with fellow employees about organizing and other activities protected by Section 7 of the National Labor Relations Act which gives employees the right to engage in what is called concerted protected activities for discussing terms and conditions of employment or bettering terms and conditions of employment. The Purple Communications decision in 2014 under the Obama Board reversed a prior decision called Register-Guard which said that the email systems of an employer are the personal property of the employer and the employer does not have to give access to employees to use and to promote the union-related activities on non-work time or even during work time of course. So I think what is going to happen during the Trump Administration Board is that I think that the old Register-Guard decision will be reenacted in some form or fashion and there is a current case pending before the Ninth Circuit where the company appealed the Register-Guard decision and I think what's gonna happen is that the old Register-Guard decision will be reenacted in some form or fashion so that those of you out there who have email systems which again virtually all of you I don't think you are going to be in a situation where you have to allow employees access to your email systems for purposes of organizing or communicating to either internal employees or external union organizers for the purposes of organizing your work forces which is a good thing. So I think that despite the current sort of trauma and all the hectic activity during the Trump Administration I do think that the National Labor Relations Board will reverse the much more employer active employer favored decision in the next couple of years. So that is a significant development.

` Another thing that I wanted to mention, this came to me by review of an employer handbook that I was asked to review a couple of weeks ago and this has to do with the whole sought of invasion of privacy element. Now I wanted to mention it to you real quickly, which is those of you out there who have, you know, policies in your handbook and stand alone policies having to do with searches of employees personal property or monitoring of voice mails, e-mails, internet usage etc. very common kinds of policies today and there is nothing wrong with having those policies but you should make it clear in your handbooks. If you are don't already, that employees have no reasonable expectation of privacy when it comes to their personal property which is brought on to the workplace or into the workplace and that the employer has the absolute right to search

employee's property and to monitor voice mails, emails, internet usage and that employees, the magic words are, have no reasonable expectation of privacy associated with that usage or with their personal property because the law of invasion of privacy is that an employer individual has no reasonable expectation of privacy where it is stated by the employer that there is no reasonable expectation of privacy associated with the search or monitoring of activity and I think that those words are important in your policies so go back and look at them. If you don't have them in your policy or if you want some help on that let me know, but invasion of privacy is no fun if you are sued and you want to make sure that from the standpoint of being proactive and being prophylactic is that you maintain your right to conduct these searches or to monitor emails etc and that you communicate to employees that there is no reasonable expectation of privacy in the workplace with regard to searches of their property, whether they are lockers, whether they are desks etc. and that you have the absolute right to monitor voice mails, emails, internet usage and that employees have no reasonable expectation of privacy regarding those.

Okay, those are the developments of the day. Michelle can you take this off of mute please. Alright, as always I am happy to answer any questions in this forum or if you would rather do it privately through my email at hkurman@offitkurman.com or a phone call. Alright, any questions, comment out there.

_____: Yes, Howard, this is _____ of the Lynwood Center the HR manager; how are you?

Howard Kurman: I am doing fine. How are you?

_____: I am fine. I have a question under this law where it is said that covered employees get one hour of work every 30 hours of work. Does it mean that it is one hour of actual work or what they are scheduled to work.

Howard Kurman: No, one hour of actual work, not scheduled, actual work.

_____: Wow, okay, wow.

Howard Kurman: Okay, any other question. Mike go ahead.

Mike: In that same line, do you have to accrue hours if they are paid vacation time that type of thing.

Howard Kurman: Its hours worked, not hours paid.

Trisha Coleman: Howard, this is Trisha Coleman Steeple Financial. I just had a question about you know we have to pay them up to 64 hours, so if they use their…..

Howard Kurman: Well, no, no, no, you have to allow paid hours up to 40 and they have to able to use 64 in a year. They would only be able to use 64 if they have accrued but unused time that they have carried over from one year to another.

Trisha Coleman: Perfect.

Howard Kurman: You don't have to allow 64 paid hours unless they have earned it.

Joan Whitney: Hi Howard, this is Joan Whitney with Compass, Inc. We already comply with the Montgomery County Paid Sick and Leave act which is slightly more generous and I think we already comply with all the notice requirements as well. When we complied with the Montgomery County do we need to put out notices again or you know.

Howard Kurman: Well, no, because as you indicated the Montgomery County statute is actually more liberal than this, but from an employer relation standpoint it would be helpful if you communicated with your employees and indicated that in view of the fact that the Montgomery County that you are already providing more liberal or generous benefits under the Montgomery County statute, that you are in compliance with the Maryland statue. If you need some help with the wording on that I can do that, but I think that, that would be helpful for you.

Joan Whitney: Okay great that is a good suggestion, thank you.

Howard Kurman: Okay.

Ann: Howard would you say that is also true if we have company policies that already provide in excess of the law.

Howard Kurman: Yes Ann, I do think that because unfortunately this particular statute being as complex as it is, I am sure employees are not going to be educated to the nuances of it, they are going to make assumptions about certain things and I think that again from a PR standpoint from an employer relation standpoint, it would behoove all employers who are already providing more generous benefits, to let their employees know about that. I think that communications have to be very carefully worded and very carefully crafted, but I do think that, that is a good idea.

Ann: Thanks.

Howard Kurman: Sure. You know as we go on in future telebriefs obviously, two weeks from know the landscape may change and we may have more guidance, either from the legislature or from the commissioner of labor and I will certainly bring those to your attention as they develop during the year, but this is a moving target, and I suspect that there will be many changes that occur or even some modifications of these as we go through calendar year 2018. Any other questions?

Leda Hill: I do, I have. Looking at the statute, one question I have is do employers have to give the 40 hours even though lets say something happens early in the year, February, do you have to give the full week even though the employee has not accrued?

Howard Kurman: No.

Leda Hill: Okay.

Howard Kurman: No, you don't. Now, it is important to note that under the Maryland Statue again I think I had mentioned this you can provide in advance, lets say you are in a calendar year and you can say as of January 1st we are providing you the full allotment of 40 hours on January 1st, you can use it already and so the employee uses it in the month of February and therefore would not have any other time left unless you have a more liberal policy to use for calendar 2018 but you don't have to allow an employee to use time that hasn't been accrued technically under the statute.

Leda Hill: Okay. Thank you. Thanks Howard.

Mike: This is Mike again, I am sorry. If you do that on January 1st, how you handle new hirers like people you hire in March or April, you just have to start accruing theirs, is that correct?

Howard Kurman: That is correct. You accrue as of the day they began employment, Mike, not as of January the 1st.

Mike: Right, so you are not going to give a new hirer all of that?

Howard Kurman: No, you wouldn't.

Mike: Alright.

Leda Hill: So, here we have personal leave, which basically they can use for sick leave and then we have annual leave if they have used up their personal leave. I think you said it was 64 hours as what we have to allow them to use within a year, right?

Howard Kurman: Well, only if they have it, so, you know, if they only have 40 hours in the bank so to speak, you don't have to allow 64 hours; 64 hours would only come into play if they have had accrued but unused leave from a prior year they carried over.

Leda Hill: Okay, so if they run out of the leave for their personal, we wouldn't have to allow them to dip into annual?

Howard Kurman: You would not. That is right. I know, listen, I can tell from these questions you all are intelligent HR professionals and you have these questions; what do you think employees are going to be asking?

Leda Hill: Oh, yes.

Howard Kurman: Okay, so I wish you all good luck in this.

Leda Hill: Thank you.

Howard Kurman: It is not an easy statute. Some of you out there, in fact most of you out there will remember when Congress in its infinite wisdom passed the Family and Medical Leave Act and it should have been relatively simple. Instead, okay, and this was decades ago when it was passed. Instead, it promulgated over a 100 pages of regulations to deal with it. I can tell you I get questions on a weekly basis from clients with regard to the ins and outs of the Family and Medical Leave Act with over a 100 pages of regulations. Here, we have a complicated statute with no regulations yet. So, how do you think it is going to be implemented in terms of all the nuances and all the technicalities, we are all going to wrestle with this for the balance of 2018 and maybe beyond.

Howard Kurman: I hate to be the harbinger of bad news but you know I will keep you filled in on future developments. Again, you can always call me or email me with specific questions but I think you got to keep your nose to the grindstone and I do think despite the fact that there will be a delay, I really believe that, in the February 11th implementation date, I think you got to prepare for it anyway.

[_____]: Okay, thank you Howard. Really appreciate it.

Howard Kurman: Okay guys. Stay tuned as they say. We will deal with this I am sure in the next telebrief.

Mike: Thanks Howard.

Leda Hill: Okay.

Howard Kurman: Take care. Bye, bye.

Leda Hill: Thank you. Bye, bye.

Howard Kurman: Bye, bye.