LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, well, good morning everybody. This is the last telebrief in February and the year is just moving along at a pretty fast clip. As you know the next telebrief will be the second Wednesday in March, which by my calendar, I don't know about yours, but my calendar says March 8th, so we will get together again then.

Okay, lot to talk about as always. Those of you out there who are still struggling with the Maryland Healthy Working Families Act, welcome to the crowd, you joined the legion of labor and employment attorneys of which I am one who are constantly being barraged with technical questions surrounding compliance with the statute, I can tell you through my contacts that the Department of Labor Licensing and Regulation that they are struggling as well. Keep in mind the politics of the situation are that you have at the top of the department Hogan appointees who were not crazy about the statute to begin with. The encouraging news I think is that I don't think that the Department of Labor Licensing and Regulation is going to be coming after employers any time soon to check on compliance, if there is any complaint it will come from an employee that is not to say that you shouldn't be busy trying to comply because as you know, despite efforts to extend the period of time within which the statute would be effectuated those efforts were defeated and that the act is actually in effect as of February 11th or couple of weeks ago. It is not retroactive to January 1st. So if you read the actual statute, you will see that ostensibly would be effective January 1st, it is not, it is effective February 11th and so therefore those of you who have an accrual system of leave would have to begin your accruals as of February 11th, not January 1st. There are frequently asked questions that are published on the department's website. I invite you to download those. You should also pay attention to the site, because as time goes on they probably will be putting out at least proposed regulation and probably a sample policy for those of you who may be looking for guidance from the department on a sample policy. Nevertheless, you are expected to comply those of you who have leave policies and are still sort of in a quandary as to whether yours is in compliance or not, certainly feel free to contact me if you wish.

Okay, there was a bill introduced into the Maryland legislature that I thought I would mention to you. This is senate bill 1010 and there is a hearing scheduled on this on March 15th, a couple of weeks from now, at 1 o'clock. It has got a couple of interesting provisions I believe pretty onerous in nature and I just want to mention to you, so one provision and these provisions would be part of it, amended labor and employment

article of the annotated code. So proposed section 3-715 of the labor and employment code would say that subject to paragraph 2 of the subsection, a provision in an employment contract, policy or agreement that waives any future substantive or procedural right or remedy to a claim of sexual harassment, discrimination or retaliation is null and void as being against public policy of the state. The clear intent of this particular provision would be that those of you who mandate the claims of sexual harassment, discrimination or retaliation be resolved by resorting lets say binding arbitration as opposed to judicial litigation would have that particular provision struck down as being against public policy under this proposed statute. This follows on movements afoot in various other states which would indicate that as a result and as a followup to the "Me Too" movement and to the sexual harassment cases that got great notoriety beginning with Harvey Weinstein in October of last year that they are trying to void as against public policy agreements that would mandate that these be decided by arbitration as opposed to litigation. Perhaps the more onerous provision of this same statute or proposed statute says the following: On or before January 1st of each year an employer, and an employer under this is an employer with 50 or more employees, an employer shall submit a report to the commission on: 1. The number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee, again the report would require the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee. 2. The number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 20 years of employment. 3. The number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential and last, get this, the commission shall publish and make accessible to the public on the commission's website each employer's annual report required under subsection (b) of the section. I do not think that this will pass, but it is certainly onerous and an outgrowth of certainly the "Me Too" movement and all the attention that it has been paid to these cases of notoriety and to the movement of afoot to attack confidential agreements or confidential provisions and settlement agreements having to do particularly with sexual harassment. Again there is a hearing on this scheduled for March 15th just coming up and, you know, lets hope that this doesn't see the light of day, but I wanted to bring that to your attention.

There is another bill that has been introduced into the house. This House Bill 974 and as a backdrop you all know that I have spoken primarily in 2017 about the Department of Labor's so called white collar exemption modifications where they would go from a salary test of $455 per week or about $24,000 annually to $913 per week or about $47,000 in change per year, so the white collar exemptions of professional administrative and

executive employees. As you know where that is, is that the Department of Labor has asked for comments on proposed regulations that they will issue. In other words they want comments from the public and then based on those comments they will issue proposed regulations having to deal with this. There is litigation in the Fifth Circuit but I think it will be up to the Department of Labor on the federal side to decide what if any increase they are going to have in this overtime salary test. But under House Bill 974 and there was a hearing on this yesterday in the house at 1 o'clock, I just don't have updated information of what happened but the gist of this particular act or proposed statute is that to be exempt from the law's overtime requirement as an executive administrative or professional employee the individual must be compensated on a salary basis at an amount per week exclusive of board, lodging or other facilities of at least $900 which equates to $46,800 per year. So it is almost the same as the Federal regulation that would have gone into effect, so this is the State of Maryland's end run at least proposed end run to get by some of the sort of status quo with the Federal Statute under the Department of Labor which again is a $455 per week for exempt status test. I don't know whether this will see the light of day either and I probably will get some more information to report on the next telebrief about the status of this, but I wanted to make you aware of it, and as you know, under the law, employees always get the best of both worlds with regard to wage and hour. So, if your state statute is higher than or more generous than the federal statute, the state law would be applicable. As you know, for instance, the state minimal wage is scheduled to increase to $10.10 per hour as of July 1st of this year whereas the federal minimal wage is much lower. So anyway, things are afoot in the Maryland legislature and, unlike on the federal side where the Republicans are in control of Congress in Maryland, as you well know, the Democrats are well in control of the legislature, so we just don't know whether any of these proposed statutes will see the light of day, but we will follow them and I will report back to you on that.

Getting back to the issue of sexual harassment, I wanted to give you a heads up those of you who may do business in New York City. So, there has been proposed legislation in the city council in New York. They passed what they called Stop Sexual Harassment in New York City Act, which would require that businesses having more than 15 employees conduct sexual harassment training of their employees. Kind of interesting that they would statutorily mandate this. I think we are at the point where most responsible employers at least give serious consideration to training their employees in the field of discrimination and sexual harassment or workplace harassment. I know personally that since October of last year with the Harvey Weinstein and Matt Lauer, Charlie Rose, Bill O'Reilly, etc., all those cases I know that a fair amount of my time has been taken up on doing training of both rank-and-file employees,

as well as management employees on workplace harassment, but this New York City statute would take it to a higher level and would statutorily mandate that. So, it is an interesting development. I will report back to you. A lot of times what you find is that proposed legislation in New York City where New York as a rule has a rippling effect throughout the country because of its influence? So, we will just have to wait and see, and it certainly would not surprise me that in the Maryland legislature, whether it is this year or next year, we have similar legislation being introduced. Those of you who are ahead of the curve would not worry about it because you do your own training or have it done by a third party, but keep an eye out on for that.

Talking about New York, there was a significant decision by the 2nd Circuit, which covers New York. This was a 2nd Circuit case decided on Monday. In a case called Zarda. The gist of the case is that the 2nd Circuit joined the 7th Circuit in opposition really to the 11th Circuit in deciding that sexual orientation is a protected classification as an extension of gender under Title 7 of the Civil Rights Act of 1964. As you know, when the Civil Rights Act of 1964 was passed, of course sex was included as a protected classification, but ever since then, and in the last five to ten years with the great advent of claims of sexual orientation, discrimination and harassment, claims have arisen under Title 7 by which employees have claimed that the Title 7's prohibition on sex discrimination would also by extension, include sexual orientation. As I said, previously, the 7th Circuit has ruled that such discrimination would be within the ambit of protected classification under Title 7. The 11th Circuit has taken the opposite view. The EEOC first trumpeted this view back in 2015. And the 2nd Circuit is an influential circuit and includes New York as I indicated, and it will be interesting to see whether these cases ripple through the various other circuit courts of appeal in the country and eventually wind their way up through the Supreme Court. The Supreme Court denied cert in a case at the end of last year, but if we have more of these conflicts between various circuits, it is probably likely that at some point in the near future the Supreme Court takes it up, and it will be interesting given the split in the Supreme Court as to how they eventually will come down, but I do think culturally we are at the point where, you know, there are many, many states including Maryland, which includes sexual orientation and gender protection within their own civil rights statute. Maryland certainly does as well as other states, so that even if it is not clear under the federal statute, that sexual orientation would be a protected classification. It is clear in many states including Maryland, if that is the case, and those of you who have discrimination and workplace harassment policies in your handbook certainly should make sure that at least if you are doing business in Maryland that you include sexual orientation within the ambit of protected classifications. Talking about Supreme Court decisions, on Monday, the Supreme Court heard oral

argument in the case of Mark Janice versus AFSCME. You heard me talk about this case back in 2017 when the Supreme Court accepted cert of this case. Essentially, the question to be decided by the Supreme Court is whether with regard public sector unions—public sector unions, not private sector unions, but public sector unions—whether public sector employers can mandate that nonunion members pay what are called agency fees in order to help financially support a union that provides collective bargaining services for those non-members. It was clear from the oral arguments and from the reports of the oral argument that at least eight members of the Supreme Court are split on this, four to four liberal justices favoring the support of the agency fees, the conservative justices not supporting it, and the one who did not ask any questions was Justice Gorsuch, the newest member of the Supreme Court. If I had to guess, I would say that ultimately the decision will come down in a five to four decision with Gorsuch ruling in favor of the conservative justices that public sector employers cannot mandate, along with the unions, that non-union members in the public sector pay agency fees. While this does not have a direct impact on private sector unions, it is simply another indication of I think the lack of impact and the lack of power of private sector unions even in our economy as the percentage of private sector unionization has dipped almost below 6% of the workforce.

The last thing that I want to mention this morning—I had a question about this from a client last week—is the extent of the obligation of an employer to accommodate disabilities and sort of the process that you go by when ascertaining or when considering a request for an accommodation. Under the Americans with Disabilities Act, as you know, an employer has an obligation to reasonably accommodate a request for an accommodation which will allow an employee or an applicant for employment to do the essential functions of the job. Now just a couple of things that I think you have to keep in mind. First of all, if it's clear that the applicant or the employee is, you know, sort of magic incantation asking for an accommodation, it's up to you as an employer to then engage in an interactive process with the employee by which you ascertain whether the employee's request for an accommodation can be reasonably granted. That doesn't mean that you have to twist yourself into a pretzel as an employer or to undergo dramatic costs or burdens in order to accommodate the employee. Remember the accommodation request has to be reasonable; and if it would impose, as the law says, an undue burden on you as an employer, then that's not a reasonable accommodation. If you need medical information that would corroborate the employee's or the applicant's need for this particular accommodation, by all means you can get that; although, you need to constrain your request for medical information to the essential functions of the job and to those duties that would be required of the employee. Generally what you would do is if you needed medical information to substantiate or even to refute the

accommodation, you would have a letter to the employee's or applicant's physician along with a medical authorization and a copy of the job description which would allow that physician to ascertain the applicant's or the employee's ability to do the job with some reasonable accommodation. The last thing that I would indicate is importantly if it's your decision not to grant the accommodation that ought to be documented. Because at some point if that applicant or employee files a disability charge against you and a retaliation charge along with that, you're going to want documentation of conversations you've had with the employee or applicant, alternatives that you considered, and ultimately why you rejected the accommodation request. You know, disability claims are very common place today and some of them are reasonable, some are not. You really should be in the mode of documenting as clearly as you can the reasons for which you haven't granted that accommodation if that is your decision.

Okay, those are the developments for the day. Michelle can you take this off of mute? All right, as always I am happy to answer any questions, comments you have, either in this forum or privately at my email hkurman@offitkurman.com or my phone (410) 209-6417. Okay, questions, comments?

Sherry King: I'm Sherry King, I work with the Maryland Department of Transportation and I had a question about the Janus v. AFSCME case.

Howard Kurman: Yes.

Sherry King: Which is at the Supreme Court now, we're waiting on the decision, I wanted to get some clarity about that, if for nonunion members that they….

Howard Kurman: Yes. That's right. So, if a nonunion member is still in the bargaining unit, you know, remember you don't have to be a member of the union to be included in the bargaining unit, and so essentially what the unions argue is that they don't believe that so-called free riders should get services at no cost to the non-member.

Sherry King: Okay, all right. Thank you.

Howard Kurman: Sure. Other questions?

Winsome Parchment: Yes, Howard this is Winsome Parchment the HR manager here at Linwood, how are you?

Howard Kurman: Good, how are you?

Winsome Parchment: I am fine. It's always a pleasure to sit on your telebrief. You're so, you know, informative.

Howard Kurman: Well, thank you, but I don't know if you're sitting or standing, but I'll take your word for it.

Winsome Parchment: I'm sitting, I'm sitting.

Howard Kurman: Okay, good, good.

Winsome Parchment: So I have a question for you, and it's in regards to the reasonable accommodation.

Howard Kurman: Yeah.

Winsome Parchment: So here we tend to, unless you hurt yourself on a job and you're approved for workers' compensation, you know, we tend to not grant what is called light duty or, so that's where the confusion is coming in, it's the light duty and then reasonable accommodation.

Howard Kurman: Uh-huh.

Winsome Parchment: And so, so we're getting it confused here with the employees, with the managers here, where I'm trying to make it clear, you know, that there are times even if someone doesn't hurt themselves on the job, and sometimes we may have to grant reasonable accommodation depending on what the physician is asking for, so they're thinking if the person doesn't hurt themselves on the job and approved for workers' compensation then we can't grant reasonable accommodation.

Howard Kurman: Well, that's problematic. Let me address two things real quickly for everybody. First of all, those of you who have employees that file workers' compensation claims will know that your insurance company will always want employees to come back to work in a light duty status, and the reason for that is, they wind up paying less money in terms of claimed dollars to the employee. But, okay, under the Americans with Disabilities Act, you're not required to create light duty if you don't have light duty. On the other hand, you may be required to consider it if it is deemed to be a reasonable accommodation, but it may not be reasonable given your workplace. It may not be really possible to create a light duty situation for certain types of positions that for instance would require physical exertion or handling clients or patients or whatever, because, for instance, there may not be clerical work that's available for an employee. And it goes back to what I was saying in the beginning which is that you don't have to sort of bend yourself into a pretzel as an employer to create a light duty or another job, but you may have to talk to the employee about

it, you may have to consider it, but you're not obligated to create something if it would be impractical to do so. So, its one of these things that you have to take a look at in every circumstance and just sort of divorce yourself from the workers' compensation, and because believe me, workers' compensation carriers are always going to ask you to put the employee back to work on a light duty status. So there is a push and pull all the time between workers' comp and what you want to do with the employee.

Winsome Parchment: Okay, so in our policy, what I was saying is that's the only time we think about reasonable accommodation is if the person actually is approved for workers' compensation outside of workers' compensation, we don't really accommodate.

Howard Kurman: Well, that's problematic, because the law doesn't differentiate between those illnesses or injuries which are work related and those which are not, and the duty to accommodate exist whether it's a workers' compensation injury or not, so.

Winsome Parchment: Yes, I know that. I just needed clarification from you so that I can go back to my managers and kind of, you know, able to explain this to them because that is, I know, you know, its…we have the workers' compensation and then we have the reasonable accommodation which is not always someone that is approved for workers' compensation, we have to look at each individual separately.

Howard Kurman: You really do need to take a second look at that.

Winsome Parchment: Yes, thank you very much.

Howard Kurman: Sure. Any other questions? Okay, well, I know we covered a lot of stuff today. I appreciate your participation as always, and have a good beginning of March. We'll see what the weather brings, and we'll reconvene on March 8th.