LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning everybody. This is the first telebrief of May. As you know we do this on the second and fourth Wednesdays of every month. As always plenty to talk about, so I wanted to start of with a bill that was passed in the Maryland legislature which to the best of my knowledge that got very little if any publicity, but I do think it is an outgrowth of the so-called Me Too Movement and I wanted to review certain elements of it for you. It's Senate Bill 1010 and its labelled Disclosing Sexual Harassment in the Workplace Act of 2018. It was passed by both houses of the legislature. It awaits Governor Hogan's signature which I believe from the best of my information will be forthcoming. I do not believe that it will be vetoed. And it has got two major provisions in it and I wanted to review it with you. This will apply to those employers and those of you out there who have 50 or more employees. Again, I believe it's certainly a direct outgrowth of the Me Too Movement called the Disclosing Sexual Harassment in the Workplace Act of 2018. So the major provisions of the new statute assuming it will be signed by Governor Hogan are that any employer and it says a provision in an employment contract policy or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation reporting or asserting a right or remedy based on sexual harassment is null and void as being against the public policy of the State. Put in laymen's terms, okay, those of you and if it's signed by Governor Hogan, it will go into effect October the 1st, only months from now. Those of you have 50 or more employees, if you have any kind of agreement which would for instance mandate or require that claims of sexual harassment be submitted to arbitration as opposed to litigation in court that would be null and void as against public policy and if you attempted to enforce it against any employee there would be a civil action that could be brought against the employer and you would be responsible for reasonable attorney's fees and costs. I know that I have clients and some of you out there may even have provisions in your employment agreements or in your policies which mandate that somebody for instance who has a claim of sexual harassment instead of filing a claim in court has to submit it to arbitration under this particular statute if it is enacted and signed by the governor, will prohibit that kind of provision. So it is a significant development. The second part of this particular statute and which I view as fairly onerous and I will review it quickly, is that on or before July 1, 2020, an employer shall submit a short survey to the Maryland Commission on Civil Rights. On, 1. 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 10 years of employment. In another words, are there or have there been sort of serial complaints against the particular employee over a 10-year span. 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, an employer shall submit the survey required under this provision to the Commission electronically. The onerous part about this is that the Maryland Commission on Civil Rights would then be able to publish and make accessible to the public this information with the exception that the names of the perpetrators or victims would be redacted. So I searched high and low, I saw very little publicity about this, but there is no question that this would be an onerous provision for many of you who have 50 or more employees out there. I will get back to you. I do have a connection with the Department of Labor Licensing and Regulation and I have emailed him to see whether or not Governor Hogan has signed this bill, as far as I know it hasn't been signed yet. There is no indication that he is going to veto the bill which would mean again as of October 1st you would have to look at your policies, look at your employment agreement and make sure that there is no limitation on the rights of an employee who claims sexual harassment in the work place and that it does not mandate that such employee take that claim to arbitration or some other dispute resolution technique instead of filing it in court. So I will certainly get back to you more about that but I wanted to bring it to your attention because again I don't think that it received a lot of publicity.

Talking of publicity and the Me Too Movement, of course, all of you probably know that the New York Attorney General Eric Schneiderman announced his resignation just the other night after it had been reported that he was engaged in "nonconsensual physical violence" against at least four women. I only bring this to your attention, because, you know there seems to be a real problem in terms of time gaps between the time that an action may have happened in the past and the time that it is brought to the attention of an employer and I think those of you out there, I am sure all of you have work place harassment policies, you want to make sure in your policies and in your procedure that it is mandated that any complaint of work place harassment be brought immediately to the attention of the appropriate chain of command, whether that is HR, senior executive, etc. So, I just point that out, you got to make sure that your policies include that kind of immediate reporting. Otherwise, you risk some one coming up a year after some thing may have happened in the workplace and making a complaint after which of course its much more difficult to investigate and to corroborate either defenses or whether or not the action happened. So just a word to the wise on that.

I came across an article, this was May 3rd, so, you know, just about a week ago by an AP writer named Christopher Rugaber and I think it is a really interesting article, the title of the article is More Businesses are Mellowing Out Over Hiring Pot Smokers and so it starts out by saying FPI Management, a property company in California, wants to hire dozens of people. Factories from New Hampshire to Michigan need workers. Hotels in Las Vegas are desperate to fill jobs. He goes on to say those employers and many others are quietly taking what once would have been a radical step: They are dropping marijuana from the drug tests they require of prospective employees. Marijuana testing, a fixture at large American employers for at least 30 years excludes too many potential workers, experts say, at a time when filling jobs is more challenging than it's been in nearly two decades. Some interesting statistics cited by the author says more states are legalizing cannabis for recreational use; Michigan could become the 10th state to do so in November. Missouri appears on track to become the 30th state to allow medical pot use. Significantly in three jurisdictions, Massachusetts, Connecticut and Rhode Island, plaintiff employees have won lawsuits in the past year against companies that rescinded job offers or fired workers because of positive tests for cannabis. And even as the article points out and I saw this in various other sources, labor secretary, Alexander Acosta, made a couple of statements at a congressional hearing last month suggesting that employers should take a "step back" on drug testing. He said we have all these Americans that are looking to work, Acosta said, are we aligning our drug testing policies with what is right for the workforce. So, the article goes on, I commend you to read it if you like, but the practical issues faced by employers many of you out there who have drug testing protocols, is that in today's day and age of very, very low unemployment, in fact, economists will call the situation that we are in full employment now, where it is less than 4%, is that are you excluding significant numbers of potential employees if there is a positive test for marijuana. Now the caveat, of course, is that for those of you who are federal contractors who do business with the federal government, you really do not have a choice because under the Drug-Free Workplace Act, marijuana is included or cannabis is included in the panel test that you need to test for or the panel of drugs. On the other hand, if you are not a government contractor and you choose as simply an elective course of action as a means of screening out applicants to utilize drug test, it really is up to you as to whether you want to include cannabis among the panel of drugs that you test for. Obviously, there are some that you still want to maintain, heroin for instance, cocaine, etc. But in today's day and age, where medical use of marijuana is certainly on the rise and my suspicion is that it will be by far the preponderance of the states in short order as well as recreational use at some point, you really need to sit back and determine whether or not you want to include cannabis among your drug testing panel. It also says that or you also can consider the fact that your

workforce may be divided into different segments, so you may have a clerical workforce for instance or you may have employees and safety-sensitive positions. It is certainly within your right if you want it to maintain the cannabis testing for those in safety-sensitive positions while excluding it for those in clerical positions or positions where past use of cannabis would not be of major concern to you. Remember as opposed to substances like heroin, opioids, cocaine which have an immediate shelf-life in a panel testing. Cannabis has a longer shelf life. It can remain in somebody's system for days and sometimes weeks which does not mean that the applicant or the employee would be impaired at the time that that applicant or employee is being tested or looked at. So I commend this article, I commend this issue to your attention particularly, obviously, for those of you who are using drug testing or have used it in the past or contemplating using it in the future. As we move along in a much more cannabis-oriented society, it will certainly be the case that you want to talk about internally whether you want to keep this in your panel or not, or whether if you do keep it in your panel, whether you want to apply it universally to all your applicants and employees or simply those in a safety-sensitive position.

Okay, let me turn my attention to another issue which is gotten a lot of publicity in the last year and a half or so and I know I have spoken on past telebriefs about this. So, in 2017 the City of Philadelphia became the first city in the nation to mandate that employers not be allowed to inquire as to an applicant's past salary history as part of the questions or issues that it would take a look at in assessing the candidate's acceptability for a position. Essentially the theory behind this, and it has been enacted in other states or jurisdictions such as California, Delaware, Massachusetts, New York, Oregon, San Francisco and New York City. The theory is that when you ask an applicant or use an applicant's prior salary history as a means of screening the applicant in effect that you would be perpetuating past disparities either based on sex ethnicity, its race, etc and that therefore it would be an inappropriate question to ask of an applicant, and Philadelphia passed this statute, as I said first city in 2017. Immediately the Chamber of Commerce in Philadelphia filed a lawsuit contending that that particular statute violated employers' First Amendment Free Speech rights under the constitution. It wound its way and finally just last week a Philadelphia Federal Judge Mitchell Goldberg ruled that the ordinance in question violated the employers' Free Speech rights, so you may say under the First Amendment. They may say well that's great news and that therefore that would be a Bellwether of attacks on the statutes and other jurisdictions as well. The problem was that there were two parts to Judge Goldberg's decision. Part 1 was under what he called the inquiry provision that said that employers can inquire as a matter of free speech into an employee's past salary history, when they are asking questions or interviewing the candidate or having it on the application. The problem

was part 2, the so-called Reliance provision, and what Judge Goldberg said was that while an employer is free to ask about past salary history, it could not rely on that salary history in setting the prospective salary of the employee. Which seems to be a very paradoxical finding from a judicial standpoint because on the one hand he is saying well, yes as a matter of Free Speech, you can ask the question but b, even when you get the answer to that question, you cannot necessarily rely on that information in setting the employee's salary. Now those of you out there who are in the business of furnishing applicants for employment, if you are a staffing company or if you are simply using this information in assessing how you are going to pay an applicant, if you go ahead and hire that person, keep in mind that this is a hot issue and that my guess is that both parties may appeal this ruling to the Third Circuit Court of Appeals, and eventually it is the kind of issue that could very well reach the Supreme Court because on the one hand, I think the Civil Rights Commissions would say, they disagree with Judge Goldberg's finding that you can ask about this question and on the other hand you have Chambers of Commerce and employers saying what use of it, what kind of utility is there if I can ask the question, but I cannot legally rely on the information that I get. So it seems to me this is exactly the kind of issue that will wind its way through the appellate courts and perhaps wind up in the Supreme Court and I will keep you apprised of it, but it was just last week that this was decided.

I wanted to bring to your attention a case that was settled just last week again by ALDI. ALDI is the supermarket chain. We have them here in Baltimore and elsewhere. It was settled for 9.8 million dollars under federal wage and hour law. Essentially and I will get to why I think it has practical value for you all. Essentially what happened in the ALDI case is that store managers and I use that word in quotes filed a lawsuit contending that 95% of their time was spent on non-exempt work and they were working 50 or more hours in any particular work week which meant, according to them, that they should have been paid overtime when in fact they were simply salaried employees. This gets to the whole issue and I know it has been brought to my attention or asked of me many times by clients as to whether or not so called exempt manager or salaried employee can do non-exempt work without prejudicing his or her exemption under the Fair Labor Standards Act, the Federal Wage Hour Law. The simple answer to it is, yes, you could have an exempt employee who does nonexempt work, but the law is clear that the primary duty of an exempt manager or an exempt administrator is the exempt work, which means that theoretically that exempt manager or administrator should be performing a lot more than 50% of his time in the exempt duties as opposed to the non-exempt duties. So there are many of you out there who have supervisors, so-called supervisors or managers, who are in an exempt position, but who nevertheless from time to time may work alongside, rank and file employees or other employees doing non-exempt

work. That's permitted, as long as that exempt employee is performing the predominant amount of his duties and time in an exempt position. If it is a close call, if it is the kind of saying where that exempt manager or supervisor is really doing a lot of non-exempt work, you better take a look at the time spent on that and you better take a look at the job description for that person and make sure that you are in compliance because you risk significant liability under the Fair Labor Standards Act if that person is working more than 40 hours in a week. As you know under the Fair Labor Standards Act, liability is high in overtime cases because you get hit with liquidated damages, which essentially are two times the amount of overtime that you would owe, plus counsel fees for an attorney who is bringing the action. So as in any situation with wage and hour law, you should be periodically looking at the job descriptions of your so-called exempt employees whether they are managers, administrators, professional employees, etc., and taking a look at the time they are spending on non-exempt work. If they are really spending a lot of time on non-exempt work, then you got to take stock of that, and either change and make that person a non-exempt person or limit the amount of time that that person would be spending on non-exempt work.

Okay, that's the docket for the day as always. Michelle, can you take this off of mute? As always, I am happy to answer any questions or comments you have, either in this forum or if you prefer sort of singularly asking it, certainly you can get to my email at hkurman@offitkurman.com or my phone number (410) 209-6417. Okay, questions, comments?

Anne: Yeah, Howard its Anne I have several.

_____: Howard will you…

Anne: Okay, you go ahead.

Howard Kurman: Well, we got two Anne's, so I don't know which one goes first.

Anne: I'll go second.

Howard Kurman: Okay, Anne Welch, go ahead. Anne did you have a question upright?

Anne Welch: It wasn't I.

Howard Kurman: Oh, okay, someone else had a question before Anne Barnes there?

Pat Becker: Hi, there. It's Pat Becker at [_____]. Hi Howard.

Howard Kurman: Hey Pat.

Pat Becker: I have a question about the testing for marijuana?

Howard Kurman: Right.

Pat Becker: Did you mention something about government contracts, since we are on government sites doing work in the field?

Howard Kurman: Yeah, if you have government contracts, then you are subject to the Drug-Free Workplace Act and you would be mandated to test for a panel of drugs which generally includes cannabis, so…

Pat Becker: Okay, right, but that is what we're doing now, I didn't know if there was a change, if we could change that.

Howard Kurman: No. No. You shouldn't change that at this point.

Pat Becker: Okay, because of federal law. All right, thank you.

Howard Kurman: Right, sure. Anne Barnes?

Anne Barnes: Just a couple of things Howard, was a federal lawsuit filed against ALDI's or Department of Labor claim? I missed what you said.

Howard Kurman: It was a lawsuit filed by… it was a certified class of managers who worked for ALDI. Yeah, it was in federal court.

Anne Barnes: Wow, I think all of us, well, you know, have those issues. I am going to that Senate Bill 1010 and the survey July 1, 2020.

Howard Kurman: Right.

Anne Barnes: Will that be…is that a look-back period that they do you know, they are going to say, you know, specific five years or whatever it is prior to 2020, or in a sense going forward?

Howard Kurman: I think, I think it is a look-back period. You know, what will happen with this statute I'm sure like any other Maryland statute, is that there may be regulations promulgated under COMAR that would be published. As far as I know, there are no regulations now, but the statute, as I indicated, says on or before July 2020, an employer shall submit a short survey on the number of settlements, blah, blah, blah, and I think it is a look-back period.

Anne Barnes: Yeah, that's what it sounded like when you were describing it. And the last thing is just for the group to know, I have noticed that on the local Baltimore television stations, there are Ads now advising employees of

their rights to time off on the Maryland Sick and Safe Act, I don't have the right name of the act.

Howard Kurman: Yup that's it.

Anne Barnes: So the…yeah.

Howard Kurman: Working Families Act, yeah?

Anne Barnes: Right, thank you, yeah, and the kind of law, they're a little longish Ads, I didn't catch who was doing that or if that's in the Ad, but this information is starting to get on to the public, so just a word to my colleagues on the call about that.

Howard Kurman: Well, I think, that that's good advice Anne, and what happened was when the Act went into effect, as you know, on February 8, 2018, employers scrambled around, some of you may still be scrambling around, to either modify or create your policies on leave, as Anne indicates, I commend you to, if you haven't done it already, you certainly need to do it. The good news is, as I understand it and as my sort of connections tells me, the Department of Labor Licensing and Regulation is not going out and knocking on doors to make sure that all of you are complying with the new statute. However, that doesn't stop or preclude an employee from making a complaint to the Department; and if they do, the Department obviously is statutorily required to investigate, so again, word to the wise as Anne I think appropriately says, get your house in order on those leave policies. Any other questions?

Sandra: Actually Howard, this is Sandra, I do have a question about that sick and safe leave. If an employee gives their notice and their intent to resign, and then they call up sick during their notice period, do we have to pay that employee for that sick time?

Howard Kurman: So, in a typical situation Sandra you're saying that like an employee says I'm terminating my employment, I am resigning from my employment, I'm giving you two weeks' notice, right?

Sandra: Yes, hmm-mm.

Howard Kurman: Right. well first of all, as you know, you are not required under the law to give that employee two weeks if they **___Audio Break__** its contractually required by your **___Audio Break__** or policy, so, if an employee theoretically gave you two weeks' notice, you could say, okay we don't need you for two weeks, you can leave tomorrow, but setting that aside, and I don't know why we're getting that signal, but setting that aside, if the employee gives you notice, and then, you know, the next day, calls off

sick, remember under the Safe and Sick Leave Act, you have the right to be able to discipline or to not pay if its really not a legitimate or bona fide illness or sickness. I would be highly suspicious of the employee who gives you notice of resignation and then the next day indicates that that person is sick and therefore entitled to Safe and Sick Leave. And remember you have limited exposure anyway if you denied it.

Sandra: Okay, good, thank you.

Howard Kurman: Sure, any other questions? Okay, well, as always guys it's been a pleasure and we will see you figuratively, if not literally, in the fourth Wednesday of May, and I hope the weather continues, and I hope that between now and then, the Orioles win a game.