LABOR & EMPLOYMENT TELEBRIEF
By
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May 23, 2018

Howard Kurman: Good morning everybody. It is May 23rd and therefore the last telebrief of May. As always there are a bunch of things to report today, so let me get started and we will run through these. In the last telebrief I had, I mentioned that there was a bill that was passed by the Maryland legislature awaiting Governor Hogan's signature, its called Disclosing Sexual Harassment in the Workplace Act of 2018, and for those of you who weren't on the telebrief the last time, essentially it does two things for employers of 50 employees or more. This would be effective October 1st of this year and as a matter of fact Governor Hogan did in fact sign this law into action last Tuesday. So it will become effective October 1st and for those of you who have 50 or more employees it will prohibit you from entering into any employment contract with an employee in which that employee waives any substantive or procedural right or remedy related to a claim of sexual harassment. So, some of you may have separate individual employment agreements with employees which previously would require for instance a claim of discrimination or sexual harassment could be decided in arbitration as opposed to judicial litigation. Under one of the provisions of this new statute, you would be prohibited from requiring employees to enter into those agreements for purposes of foreclosing a remedy related to sexual harassment. You can have individual arbitration agreements but you would not be able to mandate that employees litigate those sexual harassment claims in the arbitration forum as opposed to in court and that's pretty significant, particularly for those of you who already have existing employment agreements with your employees. The second part of this statute is one that will actually require that any employer who is covered again if you have 50 or more employees on or before July 1st 2020 render a report to the Maryland Commission on Civil Rights in which you report on the number of settlements made with regard to sexual harassment. The number of times the employer or you have paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years. The number of settlements made after an allegation of sexual harassment that included an NDA that is a non disclosure agreement or a confidentiality provision and this information will be made public on the website of the Maryland Commission on Civil Rights. So, Governor Hogan signed this, I want to let you know about that. I know that when we talked last time it had not been signed yet, but it is signed now, will go into effect October 1st. Those of you who have employment agreements need to take a look at those and if you need some assistance let me know.

Alright, I wanted to spend some time on a very, very significant case talking about arbitration that was decided by the Supreme Court on Monday and announced on Monday. Some of you may have read about this in your professional journals or in the newspapers, but it is a case called Epic Systems Corporation versus Lewis. It actually was a triumvirate of cases that arose through the different circuit of Federal Appellate Circuit Courts and went to the Supreme Court and the real issue was the effect, if any, on individual arbitration agreements which would foreclose a individual's ability to file a collective or class action against an employer, and I will go into that in a couple of minutes. This by the way was a 5 to 4 decision I think that when I talked to you many months ago about this potential case going to the Supreme Court, I predicted that it would be a 5 to 4 decision and while I am not right all the time, I was right here. So, the majority of opinion was written by Justice Gorsuch as you know he was nominated and confirmed last year to the Supreme Court. He delivered the opinion of the court. He was joined in by Chief Justice Robert also by Kennedy, Thomas and Alito. The dissenting opinions, four of them, the main dissenting opinion was by Justice Ginsburg in which she was joined by Justices Breyer, Sotomayor and Kagan and as the main thrust of this opinion was set out in the beginning of the opinion by Justice Gorsuch, I will just read briefly from his opinion, it says, should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers. Essentially the court came down on the side of employers and as the conclusion states the policy may be debatable, but the law is clear. Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgement we see nothing suggesting it did so in the National Labor Relations Act much less that it manifested a clear intention to displace the Arbitration Act. So what happened with the context of this for those of you who don't really know is that several years ago the National Labor Relations Board had a case called D. R. Horton and the thrust of the case was that under Section 7 of the National Labor Relations Act some of you may know that provision allows employees to engage in what is called concerted protected activity for purposes of discussing or improving their wages, hours and terms and conditions of employment. The case went before the National Labor Relations Board on this very issue as to whether or not an employer could compel an employee to waive any kind of group action that is collective action or class action in an individual arbitration agreement or whether that violated Section 7's proscription under the National Labor Relations Act on concerted protected activity. The National Labor Relations Board probably no surprise under the Obama board decided that any such proscription or any such requirement in an individual employment agreement would violate the employees right under Section 7 to engage in

concerted protected activity. The case was appealed and eventually there were similar cases that went before different circuit courts of appeal in the Federal system and three of those wound up at the Supreme Court and in the Epic System's case, the one that was decided this Monday, or announced this Monday. The real controversy was whether or not the Supreme Court would say that individual employment agreements containing these waivers of class actions or collective actions or group actions would violate the proscription in Section 7 of the National Labor Relations Act on concerted protected activity, and lo and behold the Supreme Court's decision basically stated that under the federal arbitration act, which was an arbitration act and a Federal statute that goes back to the 1920's, that provisions between employers and employees under which the employer would mandate as part of the agreement that employees give up or relinquish their rights to bring any kind of collective or class action would be waived in favor of simply an individual cause of action. And essentially what the Supreme Court said was those would be respected and that the provisions of the Federal Arbitration Act would be supreme over Section 7 of the National Labor Relations Act particularly since there was nothing and is nothing in the National Labor Relations Act which addresses itself to collective or class action cases. So from a practical standpoint where does that leave you. Okay. Those of you out there who have individual employment agreements with employees under which employees have waived their rights to bring collective or class actions you really don't need to do anything because the Supreme Court has validated those particular agreements. Those of you who don't have individual employment agreements particularly with your executives or other classes of employees may certainly contemplate the creation of employment agreement under which you require the waiver of any kind of collective or class action brought by an employee and as you know one of the prevalent causes of action today that you see advertised on TV or in your professional journals are collective or class actions that are brought under the Fair Labor Standards Act or under Wage-Hour Laws in the state where an individual brings a lawsuit not only on his behalf, but on other employees behalves that are similarly situated such as overtime cases, misclassification cases, etc., and so you may want to seriously contemplate obviously with some legal assistance because these have to drafted very carefully. Is the creation or use of individual employment agreements which would contain a waiver of any kind of collective or class action on behalf of the employee. Now, a couple of caveats, this does not foreclose aggressive Plaintiff's attorneys who may very well advise several employees at the same time to bring similar arbitration cases or claims against an employer because that wouldn't be prohibited by the Supreme Court's decision, it also would not prohibit the Department of Labor or the Equal Employment Opportunity Commission to sue an employer on behalf of a class of employees because after all neither the Department of Labor nor the Equal Employment Opportunity

Commission for instance are bound by individual employment agreements entered into by the employer and the employee. However, this is a very, very significant decision; and you know, I think that it certainly bears strong interest from your standpoint as to whether or not you want to consider entering into such agreements with your employees or some segment of your employees. You are not obligated to universally have employment agreements with every employee you have, but you may want to consider utilizing this kind of agreement that would waive or relinquish the employee's right to bring for instance wage and hour complaints. Now contrast that with the statute that I just enumerated to you, the Maryland statute, which is called the Disclosing Sexual Harassment in the Workplace Act of 2018. Again, you know, this is not going to effect individual employment discrimination cases or sexual harassment cases, where particularly under this new Maryland statute, you are not going to be able to require, at least in Maryland, that employees arbitrate sexual harassment cases as opposed to bringing them into court. So there are a lot of wrinkles, legal wrinkles, probably yet to be worked out in view of the Supreme Court's pronouncement in the Epic Systems case, no doubt there will be plenty of written in professional journals, law journals, and your SHRM or whatever professional association you belong to, but I wanted to hit the high spots of this. It is a long opinion, and as I said, there is a long dissenting opinion written by Justice Ginsburg as well. It is no surprise that it was a 5 to 4 decision, and I certainly foresaw this months ago when the Supreme Court granted certiorari to consider this.

Okay, enough on that; and there are a couple of other things I wanted to bring to your attention. One of them involves the National Labor Relations Board itself which recently stated that with regard to the issue of joint employer. You will recall that under the Obama administration in a case called Browning-Ferris, the National Labor Relations Board overturned years of precedent and stated that when determining whether two companies would be deemed to be joint employers under the National Labor Relations Act, that they would consider not simply whether one employer had direct control over the other employer's employees, but whether they had indirect control as well. So it was a very liberal standard in determining whether or not one employer, for instance a franchisor may be considered to be the joint employer for purposes of the National Labor Relations Act of another employer's group of employees. Well, again, no surprise, under the Trump board, now its three republicans, two democrats. The chairman is Chairman Ring, and he just two weeks ago indicated that rather than on a decision basis, the National Labor Relations Board is going to engage in rule making on this particular issue that they will put out a proposed comment period that everybody will have a chance to comment on this, labor unions, employer groups, etc., and eventually the National Labor Relations Board rather than in a decision-making basis will establish and promulgate a rule having to do with whether or not

employers can be deemed to be joint employers under the National Labor Relations Act. Again my prediction will be the rule that they will promulgate at least under this administration will be that, they will go back to the traditional tests, then unless the second employer has direct control over the terms and conditions of employment of the first employer, the second employer will not be deemed to be the joint employer of the first employer's employees, and that could spill over by the way into questions decided under the Fair Labor Standards Act or indeed under the Equal Employment Opportunity Commission, because both of those agencies have cases that also deal with the issue of joint employers under the act.

In speaking of legislation, I wanted to bring to your attention a proposed piece of legislation that was introduced into the senate in the last couple weeks. Its Senate Bill 2782 introduced by Senators Warren and Wyden and Murphy; Warren from Massachusetts, Wyden from Oregon, Murphy from Connecticut. It is called the Workplace Mobility Act of 2018, and significantly the import of the Workforce Mobility Act would be to prohibit any company engaged in interstate commerce from requiring any employee to sign a restrictive covenant or a covenant not to compete. You know, I have talked in prior telebriefs about the national trend which seems to be to disfavor restrictive covenants which prohibit employees from going from one company to a competing company; and under this proposed statute, the bill defines a covenant not to compete to be any agreement between an employer and an employee that prohibits the employee after termination of employment from performing any work for another employer for a specified period of time. Any work in a specified geographical area or any work for another employer that is similar to such employee's work for the employer that is a party to such agreement. In other words, a very far-reaching statute which would in effect, if it's enacted, prohibit restrictive covenants on a prospective basis. Significantly this statute would not affect those existing restrictive covenants, assuming they are otherwise legally enforceable, that were entered into prior to the time that this bill would be enacted, so that's an important point. We don't know what will happen in the November elections. If for instance, and by the way there's been a companion bill in the house introduced which is house bill 5631 identical to the senate bill, so for instance, in November if the nature of the house and the senate change to a democratic majority, obviously there would be a greater opportunity or chance of one or both of these versions of the bill passing, which again would be a major piece of employment legislation in the country. So I think that we need to pay attention to this particular statute. You know, frankly, again it is simply symbolic of the trend in many states today, including New Jersey where legislation has been introduced which would prohibit the utilization of restrictive covenants. The bill, by the way, would not preclude confidentiality or non-disclosure agreements

where you are trying to protect trade secrets or other proprietary information nor would it prohibit the types of agreements where you prohibit the solicitation of your customers or your employees. So this is really directed to traditional non-competition types of agreements, as opposed to non-solicitation, or confidentiality agreements. The remedies under this particular statute would be that the Department of Labor could be empowered to enforce it and to levy civil fines. It also would create a private right of action under which employees could sue in federal court, get compensatory damages, punitive damages and attorney's fees. So it is a wide-ranging bill. My practical advice to you out there is that if you are contemplating at the present time having employees sign non-competition agreements, now would be the time to do it before there is any statute enacted in congress, because after that if it is enacted you will not be able to do it. So there is sort of a window now, and if you need help drafting them let me know, but if you are contemplating using them, now is the time to use them as opposed to after any such statute would be enacted either on a federal level or on a state level as well.

Okay, those are the significant developments of the day. Michelle, can you take this off of mute please? All right well, as always I invite any questions or comments from anyone out there either in this forum or privately at my email at hkurman@offitkurman.com or my office number 410-209-6417. Any comments, questions?

Anne: Yeah, Howard, the Supreme Court's ruling, could those provisions be in employee handbooks, or are we talking about the _____ individual employment contract?

Howard Kurman: No, you have to have an individual employment contract Anne, because as most of you have employee handbooks, all of you I'm sure have provisions in your handbook which indicates that nothing in the handbook should be construed to be an employment agreement. And if that's the case, you are not going to be able to rely on your handbook to fall back on and say, well, you're going to be obligated to arbitrate a particular kind of case. You can't have it both ways. If you say your handbook is an employment agreement on the one hand, you're not going to be able to enforce it on the other.

Anne: _____.

Howard Kurman: Yeah, yeah, other questions? Okay, well I invite you all to read that opinion if you want. It's a long opinion, but I think that I certainly distilled it for you, and if you have any questions about the practical import of that decision, let me know, because it is wide-ranging and probably one of the more significant employment decisions by the Supreme Court in a long time and that's why we spent some time on it.

Okay, well, those are the developments for the day and that will take us into the second week of June. So everybody out there have a great Memorial Day, be safe, and we will see you soon.