LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning everybody. It is Howard Kurman. This is unbelievably the last telebrief in August. The next telebrief, as you know, will be the second Wednesday in September or September 14, 2016. Alright, plenty to report on today as always.

Let me start off with a piece of ironic news from the Department of Labor, which is that just last week attorneys for the Department of Labor announced that the agency had agreed to pay a bunch of employees of the Department of Labor over $7 million to settle a grievance in which the employees complained that they were not paid for so-called off-the-clock work. The period of time covered was from 2003 to 2013; part of the claims were for misclassification and again others for work performed during lunch breaks and weekends. Pretty ironic in my opinion that the agency that is charged with aggressively enforcing wage and hour laws in this country wound up paying a fair amount of money or will pay a fair amount of money for its own violations of Wage and Hour Law.

Speaking of the Department of Labor, very recently they posted on the Department of Labor website under the Wage and Hour Division, and you go on and check this out, they characterize this as misclassification mythbusters. It has to do with the issue of independent contractor versus employee, which we seem to talk about with some degree of frequency on these telebriefs. Again, you can go on the website, but I am going to sort of blow through these pretty quickly, but I think it probably is worth your time going on their website to check this out in detail. So, these are what they call myth about the classification of individuals as independent contractors.

Myth #1: They state if I am an independent contractor under one law, I am an independent contractor under other laws. Fact number one in response to this: They say even if you are a legitimate independent contractor under one law, you may still be an employee under other laws and they correctly cite the fact that it is possible to meet the standards, for instance, under the federal Wage and Hour Law and still not meet the standards for independent contractor under the particular state laws in which your company may be operating.

Myth #2: If I am classified as an independent contractor, I am not eligible for unemployment insurance. Fact: As they state, you may still qualify for unemployment insurance even if you are classified as an independent contractor. It is also true that you may be deemed to be an independent contractor under federal law but for instance in a state like Maryland or Pennsylvania where they have the so-called ABC test under their unemployment statutes while technically you might meet the standard under federal law, you might not otherwise meet the standard under federal law, so you always have to check depending on what forum you're in and what context you're in to ascertain whether your individual really is an independent contractor or an employee.

Myth #3: I received a 1099 tax form from my employer and this makes me an independent contractor. Fact: Receiving a 1099 does not make you an independent contractor under the FLSA, which of course is true. I have received enquiries many times from employer clients who state that, well I am going to give this person a 1099 and that will automatically make that person into an independent contractor, which is not the case at all. Obviously, it is one factor to consider but there are many other factors to consider in deciding whether or not somebody is an independent contractor.

Myth #4: It does not make a difference if I am classified as an independent contractor or an employee. Fact: If you are misclassified as an independent contractor, you may be denied benefits and protections to which employees are legally entitled. Misclassification also has negative effects on businesses.

Myth #5: I am an independent contractor because I signed an independent contractor agreement. Fact: In signing an independent contractor agreement does not make you an independent contractor under the FLSA. You heard me on prior telebriefs indicate that I believe that in all independent contractor situations, you ought to have a written contract or agreement with the so-called putative contractor. However, that alone will not satisfy your classification issue. Obviously, you have to meet the other test of the characterization of an individual as an independent contractor.

Myth #6: I am not on the payroll so I am not an employee. Fact: Even if you are not on the payroll, you may still be an employee, which is true. The fact that you give somebody a 1099 or that they are not carried on your payroll is not dispositive as to whether or not that person may be appropriately classified as an employee.

Myth #7: I have my own employer identification number or paperwork stating that I am performing services as a limited liability corporation or other business entity, this means that I am an independent contractor. Fact: An employer identification number or paperwork stating that you are performing services as an LLC or other business entity does not make you an independent contractor under the FLSA. Again, this is sort of like the written agreement. While it helps to have somebody who has his own employer identification number, it is not dispositive when it comes to ascertaining whether that person is appropriately classified as an independent contractor or employee.

Myth #8: My employer wants me to be an independent contractor and that means I am not an employee. Fact: Your employer cannot misclassify you for any reason which is true. Just because you want, as an employer, somebody to be an independent contractor, of course, does not mean that that person really is.

Myth #9: I telework or work off-site, so I am an independent contractor. Fact: You are not an independent contractor under the FLSA simply because you work off-site or from home. This is important. Obviously, you may have employees who telecommute and so the mere fact that you have an individual who is working from home or off-site does not automatically mean that that person is an independent contractor.

Myth #10: I have been an independent contractor for years, this means I will continue to be an independent contract. Fact: Being a bona fide independent contractor in the

past does not mean you will always be an independent contractor. Obviously that is true, it is one of the factors that the court's agencies will look at is how long has this relationship continued. Obviously, if it is a very long-term relationship, it begins more to look like an employee than an independent contractor.

Myth #11: I operate a franchise, this means that I am an independent business. Fact: Operating a franchise does not make you an independent contractor under the FLSA. Obviously, it would be one factor to consider, but it is not dispositive.

The last myth, #12: I am an independent contractor because it is established practice in my industry to classify workers like me as an independent contractor. Fact #12: Common industry practice is not an excuse to misclassify under the FLSA. So obviously it is sort of like speeding, you get a speeding ticket by a cop, you tell the cop that everybody else in your lane was going over the speed limit, it really does not matter. Similarly here, if everybody else in your industry is treating somebody like an independent contractor that does not automatically mean that the individual in question is an independent contractor. So, I invite you to go on the DOL's website, it is worth taking a look at, again if you use any degree or any number of independent contractors.

Along those same lines, it was just announced that the DOL and the Pennsylvania Department of Labor & Industry recently signed what is called a Memorandum of Understanding to exchange information, and in some cases conduct joint investigations regarding alleged independent contractor misclassifications. What happened is, if you have a complaint under the Pennsylvania Department of Labor that somebody has been misclassified or you have a complaint under the DOL that a Pennsylvania employee has been misclassified under this new Memorandum of Understanding, they will share information and conduct joint investigations. You may know that these memorandums of joint participation exist in many states; in fact, Pennsylvania is the 32nd state to sign this kind of Memorandum of Understanding. It also includes Maryland. Those of you who have had an investigation by the Department of Labor or the Maryland Department of Labor, Licensing and Regulation involving so-called misclassification can expect information to be shared between the two administrative agencies, one State, one Federal.

Okay, let me mention to you, I think an interesting case it was just decided on August 15th; this is a wage and hour case. The case called Garrison v. ConAgra Package Foods and it is an 8th Circuit decision and in this case the issue was whether the Plaintiffs who brought the lawsuit against ConAgra alleging that they had been misclassified as exempt executives were do overtime and the company took the position that they were in fact exempt executives and the Plaintiffs in this case had claimed that because they did not have final authority over hiring and firing decisions, that they were misclassified as executives. Now, many of you know that under the white collar executive exemption in addition to the salary test, which as we all know is going up on December 1st of this year, there is a duties test, and under that duties test, in order for an individual to be classified as an exempt executive that person must exercise regular discretion and independent judgment and must regularly supervise at least two employees and if the person does not have final hiring and firing authority, then must be in a position where

his recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees is given particular weight. That is in the Court of Federal Regulations. The 8th Circuit in this case found that the recommendations of these Plaintiffs had been given particular weight because they described the following indicia of exempt executive status. One, that the employees were responsible for performance appraisals and otherwise reporting deficiencies or good or bad performance for probationary employees. Secondly that some of the Plaintiffs had recommended to their superior's the termination of probationary employee and that particular recommendation was followed by their superiors. They found that some employees had been demoted predicated upon the recommendations and feedback of these putative executives. Fourth, the employees were able to and did fill temporary vacancies by transferring or moving employees from one classification to another and lastly that some of the employees had recommended discipline for particular employees and that their superiors had followed these recommendations most of the time. So, I think it is an important very recent decision as I indicated that just because you have classified somebody as an exempt manager and that manager may not have ultimate hiring and firing authority, nevertheless, you can justify that particular person as an exempt executive if his or her recommendations are being given particularly weighty evidence or weighty persuasiveness when it comes to the actual action that is taken and that is an important point to remember that because you may have let us say firing decisions, which are ultimately passed on by the Department of Human Resources or the CEO, etc., but if they are taking recommendations and giving particular weight to them of the people who are classified as exempt executives, that is a pretty good case that those exempt executives would satisfy the duties part of that particular exemption under the Fair Labor Standards Act.

Speaking again of exemptions, I want to remind you, this has come up in the last couple of weeks. I had a client who was talking to me about the December 1st implementation date of a new Department of Labor regulations and I was taking a look at some job descriptions of the particular client and my comment to this particular client that was the job descriptions that purportedly established employees as exempt are really not very well written. They were ambiguous and probably would not pass muster if examined by the Department of Labor under a microscope. So, that those of you out there who are conducting wage and hour audits in connection with the new Department of Labor regulations to be effectuated on December 1st, need to take a really good look at your job descriptions. They need to be accurate. They need to be up-to-date and they need to really, I think, in many cases trump it and, and actually have some of the same language that you would have in the Department of Labor Regulations in the Court of Federal Regulation pertaining to exempt status or administrative status in terms of the duties that these people would be performing. So, for instance, if you are looking at an individual job description for somebody who would be classified in your particular shop as an exempt executive. It would be good in your job description if you mirrored some of the language in the DOL regulations about recommendations as to hiring, firing, demotion, transfer, being given heavy weight if not dispositive weight that the person would be responsible for evaluating performance, giving comments on performance and feedback and recommending discipline, etc. All of these things would be important to note in the job description that you are attempting to establish for any particular individual and you have to go position by

position and you know, some of these position descriptions may be four, five, six years old and need to really be updated to reflect current duties and responsibilities.

I want to make sure that you all understand that the Department of Labor very recently issued a revised workplace poster under the FLSA and the Employee Polygraph Protection Act so that the new polygraph poster includes new information regarding civil penalties for violating the act and the new FLSA poster includes new information regarding worker classification issues and civil penalties and lactation breaks. They will be putting these out in print in the near future, but in the meantime, you can go on to DOL's website and download these two posters, the Employee Polygraph Protection Act and the Fair Labor Standards Act posters and put them up wherever you would conspicuously post your employee posters. They are free, you can download them and I would recommend that you use them until the new ones come into print and I am sure those of you who use like the 7 in 1 posters that are available, you probably can get new posters in the near future, which will incorporate the new poster requirements under the EPPA and the FLSA.

Okay, I want to just mention a couple of other things having to do with workplace harassment. I know that I have talked a lot about this in the past and a recent interview that Commissioner Feldblum provided online is interesting, you know that they put out a report in June of 2016 about workplace harassment and I will just quote a few things from her, which I think should resonate with you. She says, despite more than 30 years of anti-harassment training policies and procedures, workplace harassment remains a persistent problem, one-third of the charges we receive at the EEOC alleged harassment amounting to 163 charges over the past five years. She said despite the plethora of claims, most harassment does not get reported. Our research indicates that at least 85% of harassment cases never result in a claim being filed even more disturbing 70% do not even result in internal action. There are many other things that she says, but she says there is a compelling business case for stopping workplace harassment. There is the direct economic cost. Over the past five years the EEOC has collected over $700 million from complainants in just the pre-litigation stage. Last year, we collected $140 million pre-litigation and $40 million…..**DICTATION ENDS ABRUPTLY.**