LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, thank you very much by the way I wanted to introduce everybody to Sheila. Sheila is on the phone with Michelle, Michelle has been promoted to a different marketing position within Offit Kurman and Sheila is the person who will be assisting me on these telebriefs. So thank you Sheila and welcome and welcome everybody who is participating today I know that it is hard to believe that we are almost into July but we are and so as we do on the second and fourth Wednesdays of every month here we go the next telebrief will be Wednesday July 11th.

Okay, probably in about an hour we are going to get a Supreme Court decision in the case of Janus J-A-N-U-S you have heard me speak about the Janus case before, a case out of California, it has to do with public employee unions that could have ramifications down the road even in the private sector and as I have explained to you before the Janus case involves a question of whether or not public sector unions can compel its members to pay union dues or fees even if they are not so called members of the union. Now those of you who do not have unionized employees probably do not care too much about this decision but it is going to be coming down I bet in about an hour from the Supreme Court and as we all know yesterday the Supreme Court ruled in a five to four decision in Trump versus Hawaii that the travel ban was upheld and my guess is along with a stinging descent by Justice Sotomayor. My guess is that this is going to be a five to four decision which will in essence indicate that public sector unions do not have the right to compel their members to pay union dues or fees if they are not members and I think it will be a five to four decision and again I think that you will see a fairly strong descent among the liberal members of the court. So you know just sort of an FYI it is a significant employment case that may have impact down the road on non-public sector unions and we will just have to wait and see but that is my prediction less than an hour from now.

In terms of other developments the Department of Labor stated on Monday just two days ago that it is less than a week away from formally resending the so called persuader rule that was promulgated and communicated during the Obama administration. Just to rollback and explain a little the persuader rule came on the heels of the Landrum Griffin Act which was an act passed back in the 50s having to do with regulations of some union activities and employer activities and it had an exception for those let us say law firms and labor relations consultants who were advising their clients, companies in their midst of a union organization campaign so many labor and employee attorneys including

myself have in my career advised many a client in anti-union campaigns and the persuader rule under the Obama administration basically said that anybody including attorneys who even provided indirect advise to their clients, to their company clients, during an anti-union campaign had to report those relationships and financial arrangements between the attorney or outside consultant and the client. This was challenged on multiple grounds and a federal judge in Texas enjoined issued an injunction against enforcement of it on multiple grounds and said that it was really an act that was replete with all kinds of constitutional issues including First Amendment issues. Now under the Trump administration the Department of Labor has indicated as I stated that it is in the process of revoking that Obama era rule and substituting a different rule which I know will be probably much more like the original rule which has an exception and the exception says in the midst of an anti-union campaign unless the consultant whether it is an outside labor consultant or an attorney meets directly with employees there is no need for the kind of disclosure and reporting that would have been the case under the Obama administration persuader rule. So this is a significant development it is not a surprise to me I think that in 2017 I predicted that this would go by the boards and in fact it will go by the board. So those of you in the future who may face any kind of union activity or union campaign will at least be comforted by the fact that there will be no persuader rule at least in the genre that existing under the Obama administration.

Those of you out there may do some business in Pennsylvania, I wanted to let you know that on June 12th the Pennsylvania Department of Labor and Industry it is sort of like the Department of Labor licensing and regulation in Maryland submitted a proposed rule to change the salary test for their exempt executive administrative and professional employees. You will remember that of course under the Obama administration the Department of Labor had promulgated a rule which would have increased the salary test for exempt administrative professional and executive positions from what it is now $24,000 and change to over $47,000 and change. There was a great hue and cry, there was litigation, an injunction issued and now it is being restudied by virtue of rulemaking in the Trump administration Department of Labor. But the Pennsylvania Department of Labor has submitted a new rule and under its new rule there would be salary adjustments as follows. So effective on the date the final rule was published in the Pennsylvania bulletin, the salary test for exempt professionals, executives and administrative employees would go from the present $250 a week to $610 a week which equates to $31,700 annually. A year after that it would go up to $766 per week which equates to about $40,000 and two years after the initial promulgation of the rule it would go up to $921 a week or about $48,000 a year which is similar as you may remember to what the Obama administration Department of Labor had proposed back a couple of years ago. So again this is an indication that as

you know under the wage and hour law the Fair Labor Standards Act is on the federal side but states have their own little Fair Labor Standards Act and employees always get the best of both worlds whether it is on the federal side or the state side and this may signal, because Pennsylvania is an influential state, this may signal that neighboring states or other states throughout the country may propose similar kinds of salary adjustments even if the Trump administration Department of Labor does not. So pay attention to this I will keep the updated on the progress of that particular statute.

I wanted to again talk a little bit about non-compete developments throughout the country. Those of you out there who have non-compete agreements and I have talked about this before in prior telebriefs, there is a movement afoot in many states even in the federal government to limit the enforceability or applicability of non-compete agreements. Many of you may have existing non-compete agreements with executives or sales people and I would just let you know that there appears to be increasing frequency with which these agreements are either being struck down or narrowed by courts. Court seems to be reluctant today to limit the mobility of employees particularly in an economy like we have where the rate of unemployment is extremely low and where companies are fighting for good qualified people. There is certainly a movement afoot to limit the applicability or at least the breath of non-compete agreements and again I just want to review with you there really is a spectrum of post termination restrictions that you can impose on employees, the most severe of which is obviously a strict non-compete agreement which would prohibit a departing employee from working for a competitor. If you are envisioning that kind of an agreement and you want to actually restrict a departing employee from entering into a competing job you should make very clear in your non-compete agreement the specific job duties or positions under which the departing employee may not be able to compete with you. You get to what is called the so-called janitor rule which is that some non-competes are so broad, so expansive, that in effect it would prohibit your departing employee from even working as a janitor for a competing company which does not make a lot of sense. So if you have an existing non-compete there is probably not much you can do about that but if you are contemplating the drafting or creation of a new non-compete with a entering employee or even an existing employee make sure that you really define in a specific way the jobs or positions for which that departing employee may not be able to engage. From the more restrictive to the least restrictive you also have non-solicitation agreements so you may prohibit a departing employee or you may allow the departing employee to work for a competitor but not to solicit your existing clients or customers. There you have a couple of different variations, so you can prohibit the departing employee from soliciting any of your existing customers period, or simply those customers with whom the departing employee had a

relationship. So that is a more lenient kind of standard it is one that courts are generally defer more to than a strict non-compete agreement and last you have what I call not pirating agreements which is where you would prohibit the departing employee from soliciting or hiring any of your existing employees. The point I want to make is that for those of you who are contemplating the entering into relationships with a new employer an existing employee with non-competes there are variations on the theme and you really need to narrow the scope of the non-compete according to your legitimate business interest. Otherwise courts will not give you a favorable treatment or defer simply to a broad-based non-compete which has little relationship to the legitimate business interest that you are attempting to protect.

Okay I had a client couple weeks ago who called me about the fact that an employee who was out on leave provided a doctor's note which in essence said it is indeterminate when the employee will be able to return to work. I wanted to bring to your attention a recent decision, very recent decision, by the Third Circuit this is a case called Keefer versus CPR Restoration & Cleaning Services. In this case the employee had a shoulder injury that really prevented him from going back to work and the worker requested of the employee, excuse me of the employer, in "a few weeks or a few months" of leave. The employer would not permit that and terminated the employee and the employee filed a lawsuit which then made its way to the Third Circuit. And the Third Circuit in its decision noted that under the Americans with Disabilities Act "a short period of definite leave that would enable an employee to perform his essential job functions in the near future" is a reasonable accommodation. However "the request for leave here specified neither a leave for a definite period nor a return in the near future". So according to the Third Circuit it interpreted the employee's demand for a few weeks or a few months of leave to be a request for indefinite leave which they construed as not a reasonable accommodation under the Americans with Disability Act. Which is in accord with the recent decision by the Seventh Circuit which held that even 2 to 3 months of additional leave was not deemed to be a reasonable accommodation. So I advise you that when you have an employee who was out on leave whether it is under the Family Medical Leave Act, whether it is under some other unpaid leave provision in your policy and then the employee requested an extension of the leave. The EEOC would indicate and would advise you to look at those on an individual case by case basis which is correct however there is a very persuasive case law which basically states that an employee who was requesting an indeterminate amount of additional leave or where you have a physician who was indicating that the employee needs to be out for an extended period of time or it is indeterminate when the employee may be able to return that would not be deemed to be a reasonable accommodation or required under the Americans with Disabilities Act. So I just indicate to

you that this is not an infrequent occurrence. For those of you who have employee to go out on medical leave and I think that you have to look at these things individually of course but you do not have to be paranoid about denying a request and terminating employment where the request for leave is so ambiguous or the period of time is so indeterminate that you just cannot tell when or if the employee would be coming back to work particularly if there is a legitimate business need for that employee to come back to work.

The last thing that I wanted to talk a little bit about is that just two weeks ago the EEOC filed seven different lawsuits against different companies alleging unlawful workplace harassment most of which was sexual harassment. These cases if you look at the facts all really pretty much contain egregious sets of actions on the part of the employer. So for instance the first case was EEOC versus Total Maintenance Solutions Inc. This was a case filed in Ohio Federal Court on June 13th and it is alleged that the owner of this company Leroy Evans which was a commercial cleaning company illegally harassed its office manager and under the facts as alleged in the lawsuit they say that this guy Evans, who owned the company, called the female employee his "little young ass" telling her that she looks sexy and making nighttime calls to her, pretty egregious fact-based situation. The second case that it filed was a case called EEOC versus Prime Inc. filed on June 13th against a very large national trucking company and it alleged that this company caused its employee when it allowed her or permitted her to drive with this fellow even though the company knew he had a history of sexually harassing others before her and actually had been previously suspended for that. They never warned her about it and of course the driver engaged in some inappropriate conduct and eventually she filed a complaint which led to the EEOC filing a lawsuit on her behalf. There was another case that was filed on June 13th in New Mexico against the company called Select Staffing alleging a persistent course of sexual harassment and the list of incidents in the complaint included the employer calling its female employees prostitutes and sluts, touching their backsides and breasts, referring to them as stupid and dumb broads etc. And there are four other cases that I need not really go into detail with other than to let you know these are all filed pretty much on the same day and it points to just an outgrowth of the Equal Employment Opportunities task force on harassment which indicated several weeks ago that the agency itself was going to be largely concentrating on these kinds of systemic and pervasive workplace harassment cases. So I would caution you again I am sure, at least I would hope, that none of you out there have situations which are akin to these seven different lawsuits where anybody on the phone call here would say that if those allegations are substantiated the employer has not only acted illegally but stupidly. And I think it is all about culture of course you need to have a culture of propriety and civility in your workplace I say this all

the time it may sound redundant but it is not just that you have a well stated and communicated policy. The policy is what I would call a necessary but not sufficient element of protecting yourselves against these kinds of workplace harassment cases or claims. The policy needs to be accompanied by the establishment and the maintenance of a culture of propriety and civility in your workplace which really can only be created by the top executives in your company and those of you out there need to understand that if you are in HR or some other position it is really your responsibility it seems to me to make sure that that culture of civility is created within your company so that the policy alone would not do it you need the culture and you need training which happens on a fairly frequent basis of your rank-and-file employees as well as your management staff.

Okay those are the developments for the day. Sheila can you take this off of mute. Okay as I always do I am happy to answer any questions anybody may have comments etc. either in this forum or privately on my email hkurma@offitkurman.com or my phone which is 410-209-6417. Okay any questions.

Mike: I am just wondering that Pennsylvania law with the new standard for earnings.

Howard Kurman: Yeah it is not law yet Mike it is a proposed rule so it is not in effect yet.

Mike: But that would only effect companies that are operating or have a brick and mortar building there in Pennsylvania in another words we have many employees that live in Pennsylvania does it affect residence or just if you operate in the state.

Howard Kurman: No it would have to do whether you actually do business in the state of Pennsylvania.

Mike: Okay.

Howard Kurman: Anne did you have a question.

Anne: Yes Howard my question is also about that, the proposed rule, what would it take for the proposed rule to become effective and do you have any sense of timeline.

Howard Kurman: Well I think that in order to, you know it is like any administrative process where a proposed rule is published they then ask for comments, there will be a comment period and then obviously you have comments that are submitted by both labor unions and employees as well as companies and then what happens is they will take those comments and as a result they will publish a final rule. I am not exactly sure of the timeline but I do not

think that it is imminent that process alone could take weeks or some months Anne so I think this is probably a late I think this is a late 2018 initiative.

Anne: Got it thanks.

Howard Kurman: Okay sure, any other questions? Okay if not I appreciate everybody's participation and as always we will reconvene the second week in July and wish everybody a good but a safe July 4 holiday thank you.