LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay. It is 9:02 on my clock. We are going to get started. Michelle, can you mute the line please? Alright. Good morning everybody. It is the last telebrief in January, hard to believe, but 2017 is upon us, and, as usual, a bunch of stuff to talk about.

The first thing that I wanted to mention is something that may be a trendsetter, I am not sure, but this happened on Monday when the Mayor of Philadelphia, Jim Kenney, signed a new law into effect that will prevent Philadelphia employers from inquiring or asking job applicants to disclose their prior salary history. Now, I know that we have talked about this before in some telebriefs. Actually, Philadelphia becomes the first big city to enact this legislation. As you know, we talked about this before and, Massachusetts passed a similar act back in August of 2016, which will go into effect in July 2018. Similar bills we know have been introduced in New Jersey and in New York City but, this is the first bill that has been passed in a United States city, and it was passed by Philadelphia's City Council in December and will go into effect 120 days from the date that the mayor, Mayor Kenny, signed it on January 23rd.

It is an interesting statute, and, those of you out there, and even most of my clients, most of the time ask for prior salary history in order to get some idea about what the appropriate new salary should be, whether it will be within your salary structure or the competitive marketplace. It is not without its opponents. In fact, the Philadelphia Chamber of Commerce had a statement, and I will briefly review it for you today. It says – with today's signing of a salary history bill – and that was on Monday – the City of Philadelphia continues its record of passing legislation that hurts job growth and business expansion. While this bill is supposedly an attempt to improve wage equity, there is in fact no evidence whatsoever that asking prospective employees about their current compensation contributes in any way to wage inequities. Unfortunately, the city government has rejected a proposal by the business community to discuss and enact a real wage equity ordinance. While the Chamber is deeply committed to highly diverse and inclusive workplaces and will not tolerate wage inequity, we believe passage of this measure says Philadelphia is not open for business, says Chamber President and CEO Rob Wonderling. Philadelphia has a reputation around the country and world for having a high cost of doing business. With this bill, we have reinforced our unfortunate anti-business reputation of having a city government that tells companies how to run their business. It was not without its opposition, and I assume it will not be without its opposition if it's introduced in any of the other big Eastern cities as well, but it seems to be a trend, and, of course, if that were enacted, you would have to remove that question from your application. Now, it does not mean that you could not ask an applicant what that applicant's salary expectations were. That is a perfectly appropriate question, to ask an applicant what do you expect to

earn. Obviously, for most jobs, you are going to have your own innate ideas, either because you have done research or you have had the job filled before, on what the applicable salary range would be.

Nevertheless, and I have said this is on prior telebriefs, it is useful to know what an applicant's prior salary history is for a couple reasons. One, obviously, the extent to which you have an applicant who has moved up the salary scale in an impressive way is some indication of past job performance or past performance at an employer or prior employers. Secondly, I think that it is important to know what that salary history is so that you can gauge some reasonable expectation of what that person may be looking for in a salary increase; whether it's a 10% increase, 15% increase, etc. Nevertheless, under the Philadelphia statute and in states, which have enacted it, you are not going to be permitted to ask it. An interesting question which is left open is whether or not you can receive this information; for instance, if you are considering an executive who is forwarded to you by a placement or a search firm, and that search firm indicates to you what that person's salary is or salary history is, we do not know as a prospective employer whether the placement agency asked or whether that person volunteered because, under any statute, it is permissible for the applicant to volunteer salary history. It is just that you can't, as an employer, condition employment on revealing prior salary history or ask prior salary history.

This whole issue seems to be something that is gaining traction nationally, and I would not be surprised if in Baltimore or other metropolitan areas in Maryland or even at the state level we have similar legislation that is introduced in the near future so, stay tuned about that.

Speaking of state legislation, we know that – or you probably know that there has been a bill introduced into the Maryland State Legislature, a sick leave bill that would mandate that companies with 15 or more employees provide seven days of paid sick leave per year and those with fewer than 15 employees would be required to provide unpaid days off. This, as you know, was introduced in the Maryland legislature last year and got a lot of news coverage. Ultimately, it did not pass. I think the prospect of something passing in this session are greater than they were last year.

One of the reasons is Governor Hogan has also proposed a form of paid leave that would require those employers with 50 or more employees to offer five days of paid time off. In order to be eligible, the employee would have to work an average of 30 hours per week, and, under Hogan's plan, businesses that have fewer than 50 employees and that provide five days of paid leave would qualify for a tax exemption; kind of an interesting concept. The following statement was promulgated and disseminated by the Maryland Chamber of Commerce in regard to the governor's prospective legislation. It says "we applaud the Governor for introducing legislation that reflects the many concerns that the business community has articulated regarding paid leave. While the Chairs of the respective labor committees have included the business advocates in the process, we cannot support such a mandate due to the costs that will be

imposed on employers. When it comes to improving our overall business climate, the legislature's most recent version of the mandatory paid leave bill is a step in the wrong direction." This is going to be a bill and a conceptual piece of legislation that will be followed closely between now and mid-April when the session ends and again I think the prospects for some legislation to pass along these lines is greater even this year than it was last year, so stay tuned on this. I am sure many of you out there already have sick leave provisions for your employees. The problem is that many of you may have a rolled-up personal leave policy, which would combine sick leave, personal leave, vacation into one sort of bucket of personal leave. Depending on how the legislation is drafted and enacted if it is enacted, you may have to revisit it and then separate out as a bucket your sick leave provisions for employees, but again, I will keep an eye on this and I will let you know what transpires with regard to this particular issue.

On the Federal side interesting that President Trump has ordered executive department and agencies to freeze all pending regulations until the administration or the appropriate people in the Trump administration can review them. This obviously would include the controversial DOL overtime rules, which were to go into effect, as you know, on December 1st, which were stymied by litigation in Texas, which is still pending by the way, but it signals that many of the executive orders and regulations that were enacted and considered by the Obama administration may no longer have traction under the Trump administration. In fact, it is not unlikely that with regard to the DOL litigation that under the Trump administration the appeal of the injunction, which would prohibit enforcement of the DOL's overtime rules could in fact be withdrawn by the Trump administration. We do not know what will happen. We do know that the hearing with regard to the newly nominated Secretary of Labor, Mr. Puzder, has been scheduled for February 2nd, a couple of weeks from now. He may face stiff opposition in both the Senate committee and the Senate as a whole because he has been fairly blunt about his anti-employee-type enactments but, I think ultimately he will be confirmed and I do think that it will be quite different Department of Labor under Puzder than it was under Tom Perez, who interestingly by the way I saw last night on the news on MSNBC and he was very blunt in his criticism of the incoming Department of Labor Secretary. I am not certainly surprised but very, very blunt in his criticism of the guy who has not even gotten a hearing yet before the Senate sub-committee. We will see what happens, but the freezing pending regulation I think is not unexpected and it may roll back many of the kinds of regulations that we have talked about in 2016 including the persuader rule, which I think is all but dead under a Trump administration.

Okay, couple of cases that I wanted to mention that very, very recent. One case came out – this is a 10th Circuit case just decided last week. It is a case called DeWitt v. Southwestern Bell Telephone Company. It is a 10th Circuit case and here we had the termination of a customer service representative who happened to have type 1 diabetes and she was on already a last chance agreement with Southwestern Bell Telephone Company and what happened was she hung up on two customers on two separate occasions during a shift,

which precipitated her termination. She then filed a lawsuit against Southwestern Bell Telephone Company under claims of ADA and FMLA violations saying that she had been discriminated against on the basis of her disability and on the basis that she should have been provided with FMLA leave for her problem because she indicated that the reason that she may have hung up on customers was because she was having a diabetes-related incident while at work. The trial court granted summary judgment to Southwestern Bell Telephone and she appealed to the 10th Circuit. The 10th Circuit interestingly reiterated that the concept in employment law is that when an employer makes a good faith honest decision that an employee is engaged in misconduct, that good faith honest decision will overcome any claim of discrimination or retaliation or a claim that there should have been a different outcome or that somebody looking at it from the outside would have come to a different conclusion or imposed a different penalty or discipline on the plaintiff. Essentially, what the 10th Circuit said is that even if you have a disability as an employee it does not excuse misconduct in the workplace and that an employer's assessment of misconduct as long as it is reasonably based judged on what an employer viewed as facts at the time of the discipline is not going to be second guessed by either a trial court or an appellate court, and this is not a unique finding, although it is certainly just a week old. Many circuit courts say the same thing, and I know that I have counseled clients many times on the fact that when they are considering the discipline and particularly the termination of an employee based on an assessment of facts, that it is the good faith judgment of the employer that really is important as long as that good faith and honest belief is supported by facts as they see them at the time the action is contemplated and taken, then no court either trial court or an appellate court is going to second guess that employer. It does not mean that there is not some risk to the employer, but it does mean that the good faith and honest belief of an employer is often credited and there is a high bar for an employee in a discrimination case to basically defeat that honest claim and good faith belief of an employer who has made a judgment that the discipline is warranted particularly in a termination case so, it is a good statement of that again only a week old.

Another case that I wanted to just briefly mention is a 9th Circuit case decided last Friday involving Slumber J and it is a fair credit reporting case, and again it restates a concept, which is not unique but nevertheless is one that needs to be I think circulated and known by employers because what happened in this case is that Slumber J on its application form combined the Fair Credit Reporting Act disclosure and contained a statement which and I quote, "I hereby discharge, release and indemnify prospective employer from all liability and claims arising by reason of the use of this information that is false and untrue if obtained by a third party without verification." Those of you out there who obtain information through the Fair Credit Reporting Act on applicants or even employees have to know that under the Fair Credit Reporting Act, you need a separate disclosure form for the applicant or employee and that separate disclosure form cannot contain a waiver of liability or any other kind of content. It is solely to disclose to the applicant or employee the fact that you as an

employer or prospective employer intend to get consumer information in the form of criminal background check or references, etc., and that there should be no other references to information, for instance, waivers of liability, indemnification, etc., because if you do, you have violated the provisions of the Fair Credit Reporting Act, which indicate that you are limited in that disclosure to only indicating to the applicant or employee that you are going to get information and that you get the employee's signature on the authorization to disclose or get disclosed to you information from what is called a consumer protection agency under the Fair Credit Reporting Act; and in this case, the 9th Circuit indicated that they would okay a class action against Slumber J for having violated it, and of course, you don't intend to do that. I know that there is no intent on the part of Slumber J or any other prospective employer to do that, but the Fair Credit Reporting Act has come under scrutiny increasingly in the past and for those employers that utilize these disclosure forms, it should not be on your application form, it should be a separate disclosure form, and if you need any assistance on that, certainly, I can help you with that, but you don't want to risk the kinds of liability that are out there for having violated this because you are also liable for attorney's fees in these cases, which can be substantial.

Okay, those are the developments of the day. Alright, so, as always I indicate that if anybody has got any questions or comments, feel free to raise them in this forum, or if you prefer in private my email address is hkurman@offitkurman.com or telephone number is 410-209-6417. Any questions or comments? Okay, well, as always there is plenty of stuff I am sure that will come up in the next two weeks and the next telebrief will be on Wednesday February 8th, the second Wednesday in February so, keep in touch with what is going on in the Trump administration. There is a bound to be a lot that is going to go on in the labor and employment field in the next weeks and months so, stay tuned and we will see you again on February 8th. Thank you.