LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Good morning everybody. As I told a few people, I'm calling in remotely from Florida, so I don't want to make anybody jealous, but that's the way it is. Anyway, as always there is important stuff to report. I wanted to begin with a Supreme Court case. Many of you may have read about it. This was a case that was decided on April 2nd, so, you know, just about a week ago, called Encino Motorcars v. Navarro and it had to do with a question under the Fair Labor Standards Act of whether or not certain service advisors that worked in an automobile facility in California were exempt, that under the Fair Labor Standards Act there is a specific exemption for any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles from overtime pay. Now, the reason I think that this case is important. Those of you out there who want to read it certainly can find it easily on the web, but the reason I think it is important is that the Supreme Court overturned probably about five decades worth of interpretations when it comes to whether or not a particular position is exempt under the overtime rules under the Fair Labor Standards Act. Prior to the Encino case the test really was in a close case that it would always be construed against the employer. In other words there was a high bar in order to meet the exemption test and if the court was on the fence it would construe it against the employer. This is a 5:4 decision. No surprise, of course, 5:4 decision with this particular court. The majority opinion written by Justice Thomas and essentially what the court said was that rather than construing any particular close exemption call against the employer that the court would henceforth be required to basically take a very universal approach in determining whether any exemption would apply and that would include looking into particular position in question, its relation to industry practice, the statutory language in the Fair Labor Standards Act and regulations, job descriptions, etc., and then and only then would a court be in a position to make a decision as to whether or not a position was exempt or not. So even though this position really only deals with one position, I think it does have meaning and significance beyond this one position and as you all look at your job descriptions or you look at your pay practices, etc to determine whether or not you believe a position is exempt or not. Keep in mind now that there should be a little friendlier interpretation if it is a close call. Again prior history before this Encino case was that the bar was high that exemptions were strictly construed against employers and that if sort of the court was in equipoise meaning just as likely to be exempt as non-exempt they would rule that it was non-exempt. This does have language in it that changes that paradigm and I think there it will be a significant decision

going forward. It also signals in my opinion and you know I have spoken about this in the past with regard to the present composition of the Supreme Court now with Justice Gorsuch on the court that I think that in the next several months, years, etc., until may be the composition of the court would change more to the left that we will probably see a series of 5:4 decisions being employer oriented as opposed to employee oriented.

It brings me to another decision that I wanted to point out to you which was a case out of the 9th Circuit just decided on Monday and this was a 9th Circuit case decided en banc, an en banc decision is where the entire panel of the Circuit Court rules on the case and it is a case called Rizo v. Yovino and while the Encino case can be looked upon as being favorable to employers this Rizo case is expressly unfavorable to employers because what it stands for is that they say that under the Equal Pay Act and as you all know the Equal Pay Act says that men and women can't be paid differently for the same job simply on the basis of gender or sex. That is in essence what it says. In this case, there was a consultant who sued the school district out west, it is the Fresno County Superintendent of Schools contending that they had a policy in place where by when they hired employees they simply gave them a little bump from their prior salary in order to bring them on board and she protested basically contending that in doing so you would perpetuate the inequality between men and women's salaries for the same job. They went all the way up through various levels in the Federal Court and wound up as I said at the 9th Circuit where the 9th Circuit decided on Monday that henceforth you would not be able to use, an employer would not be able to use past salary history as a means of determining salary in the present job if it was an inequality with the men's salary for the same or equal job. Another problem with that is as you will know we do hiring, you always look at the salary history of somebody in order gauge what you may be willing to pay and of course on the other end of the spectrum and this was pointed out in dissenting opinion in this case. Employees often use that as a means of negotiating for higher salary or entry salaries when they come into a new job. I don't know what really the long term impact of this case is. Remember this is the 9th Circuit at Southwest. It does not govern those of you who do business in Maryland and then surrounding states. The problem is that there is a split now in authority. So the 7th Circuit takes an opposite view indicating that as long as its not being done in a discriminatory manner that past salary history can be used, I think, and there are other circuits where there are mid approaches being taken. Given the fact that this really does create a circuit split, a pretty distinct circuit split, and given the fact that the attorney for the Fresno County School board has said that they are going to seek cert in the Supreme Court, I think there is a good chance that this does wind up at the Supreme Court, and if it does, based on again the composition of the court and given the sort of pro-business leanings of at least a majority of this court, it would not surprise me that if the Supreme Court said

basically in a 5:4 decision that, of course, business people always use prior salary history and as long as there is no other indicia of discriminatory intent to pay females less than males that it is a relevant factor that can be used in determining ones entry salary. So it is an important case and it has gotten a lot of publicity; it was even on the national news the other day, so I will keep an eye out on it and if cert is granted by the Supreme Court I will certainly let all of you know.

Okay, I wanted to turn my attention to something that came up with a client of mine just about a week and ago. This is a client who has people that do service out in the field in a different industry, a very technical industry, and the question posed to me was what kind of background check do we need in order to avoid any kind of potential liability or claim. Which brings into focus, lawyers call the claim of negligent hiring, and I just wanted to review a few things for you, particularly those of you out there who have people that interact with the public or even interact with people in their homes that is where there is a risk that somebody who is performing services for your company is not under your roof but outside interacting with third parties, and while negligent hiring or retention can sometimes be used when one of your employees injures another employee, many times that would be barred by the workers compensation statutes, which are the sole and exclusive remedy of an employee who gets injured on the job. But what I am really talking about is those people or those employees who interact with the public or third parties, and they create harm to that third party or the third party turns around and sues you as the employer. So, just a couple general principles that I wanted to review with you all, which is that you really need do a reasonable investigation prior to the time that you hire these individuals and certainly the things that you need to consider are the risk that such a position would have in terms of the safety of third parties, so that if you have somebody that is performing service in somebody's house, obviously, the degree of scrutiny and the degree of pre-hire due diligence that you would utilize is higher than if you just have a salesman calling on a commercial entity. What the law requires is that you again use reasonable care in hiring the employee that you knew or should have known through the exercise of due diligence that this person may have had dangerous propensities and, of course, that would entail doing background checks, which also brings into focus the Fair Credit Reporting Act, which, as you know, will give you access to criminal backgrounds, but of course, in order to get that information you have to go through the procedural safeguards that are contained in the Fair Credit Reporting Act. So, I think it certainly bears stating that those of you who are in the hiring business and where there is certainly exposure of your employee to third parties. You may need to exercise an extra degree of scrutiny in order to make sure that those people who are interacting with those third parties don't injure them and if they do and if there is a claim against you as an employer, that you can at least defend yourself on

the basis that we did everything that was reasonable and I stress the word reasonable in order to do our due diligence. Obviously you are not an insurer of a person's past history, so that there are certain limitations on what you can get, what you cannot get, what you can use, what you cannot use, so for instance, of course, the Equal Employment Opportunity Commission takes the position that with regard, for instance, to looking at convictions that there be an individualized assessment of the particular conviction in place for an applicant that you look at how long ago was the conviction, what did it entail, what is its relationship to the position for which the employee seeking employment, and if you are trying to avoid a negligent hiring or retention claim, certainly you want to assess or analyze what is the extent to which this particular applicant could pose a risk to third parties out there. So, I just remind you because sometimes I find that clients view hiring more in the sense – well, does this person meet our qualifications, then taking an assessment of look this person is going to be out in the public and what if anything in this person's background is there that should alert us to potential problems with this particular applicant. So again, just a word to the wise, those of you out there who are doing that hiring, you got to use due diligence and you got to do whatever is reasonable under the circumstances given the sensitivity of the particular job that you are seeking to fill.

Legislation that is of interest, March 31st, again like a week and half ago, the New York legislature, those of you who do any business in New York or have employees in New York, the legislature passed a bill which, among other things, and there are other things, but I wanted to point this out, it requires employers to implement sexual harassment policies, which is no big deal, I mean you all have that, but it also requires that employees be provided training and harassment prevention on at least an annual basis. Now many of you have heard me speak about training over and over and over again. Again I emphasize it, but this is simply legislation in New York, which mandates that employers conduct this kind of training, at least once a year and as the Equal Employment Opportunity Commission has said in its guidance and advisement, that it recently disseminated; that does not mean that you just have employees look at a video once a year. On the contrary, I think that there needs to be personal training, with both management and rank-and-file employees on an annual basis.

Okay, let me turn my attention to another thing that came up. I have a client that has a very large proportion of Hispanic employees, and the question was: what do we do with regard to posters and policies with regard to putting them out in Spanish as well as English? So let me just address that. Essentially under federal law, there is a duty to translate official posters and policies. If you have a significant proportion of employees who are not English speaking, in fact, many of you may know that the Family and Medical Leave Act regulations require that an

employer translate its posters into a language where there are predominant number of employees of that particular speaking language. Also, if you are a federal contractor or a subcontractor, you are required to post translations both in the physical posters and in electronic postings. So the best advice I can give you is this: take stock of your workforce. If you have a significant number of employees in one sort of national origin background or another, and you know that English may not be understandable, comprehensible or spoken by many of them on a regular basis, then you may need to translate some posters, and frankly, even your handbook into a language that they can read and understand. The last thing that you want as an employer is for an employee to say I could not understand the policy because I am not real fluent in English, if you are defending against an employment-related claim, and there are services out there even on the internet, you can use Google translation services. I mean there is plenty of stuff that you can do in order to satisfy the legal requirements for translation. So take a look. I mean obviously if your workforce is 100% English-speaking, then you do not have to worry about it other than appeasing if you are a federal contractor or subcontractor and you have to do it, but otherwise, if you have a significant number of non-English-speaking people, take stock of that and if you have to translate individual policies or posters, then so be it. It is not that expensive, and it really will protect you against the claim by somebody that they did not understand the particular question at hand. That is the last thing that you want to get hit with.

The last thing I will say is that just yesterday there was a hearing before the Senate at which Sharon Gustafsson—she is the person who has been nominated by Trump to be the general counsel of the Equal Employment Opportunity Commission—she testified in a hearing and she has got an interesting background, I mentioned this I think on the last telebrief or maybe the one before, which is that she has been a solo practitioner for about 20 years. Prior to that she was with Jones Day, a very, very large international law firm where she defended employers against discrimination claims, but then she left, set up a solo practice and actually represented employees in discrimination cases. She was questioned yesterday about the EEOC's position on whether or not LGBT classification is one that is protected under Title 7. Remember there is a split in the circuits. Most recently, the Second Circuit and the Seventh Circuit have indicated that they do believe that LGBT employees are covered as a means of sex discrimination under Title 7, while the Eleventh Circuit says no, and so I think that she was hit with this question and she played it pretty politically coy saying that she would support whatever the commissioners take as a position at the Equal Employment Opportunity Commission. She is the chief prosecutor as you know, the general counsel is the chief prosecutor and I am sure that whatever the EEOC determines and, of course, I think what the EEOC is going to say is that under their

most recent pronouncements it is a covered or protected classification, so I think the EEOC will stick to its position and, ultimately again I think this is going to be a case that goes up to the Supreme Court as well. So those are the developments of the day.

Okay, as always any questions I am glad to answer, comments or whatever, or you prefer privately, you know, certainly my phone is 410-209-6417. Don't call today as I am in Florida, but you could email me at hkurman@offitkurman.com as well. Any comments, questions out there.

Anne: Yeah Howard, it's Anne. So our company has used a really great translator for our documents that have to be translated, even to such very narrow languages as Haitian Creole and I am glad to hear that people want to call the name of the company in case they want… we found their prices to be very reasonable. They are really great to work with. The company is TransPerfect, capital T-r-a-n-s-P-e-r-f-e-c-t and the rep there we have dealt with is Ellie Carroll and she is at 424-354-2709.

Howard Kurman: That is great Anne.

Anne: Everybody on the call could use that. We found them really great to work with.

Howard Kurman: That's great information because sometimes it is not easy to find these people. So I really appreciate that, thank you.

Anne: Yeah, and we have even had stuff around the country translated into Bosnia, so you know beyond just American Spanish right.

Howard Kurman: That's great! Thank you so much. Any other questions, comments.

_____: Hey Anne. Where are they based out of?

Anne: I have no idea.

_____: Okay.

Anne: We had one of one our remote HR assistants found them for us. We had couple of bids on this job a year or so ago. I don't know where they are located. We have done everything with them, you know, remotely by email.

_____: Thank you so much.

Howard Kurman: Any other questions. Okay, well if not, hopefully we will see each other figuratively anyway in the last telebrief in April. So, we are moving ahead

into spring, although I understand it has not been so nice last week in Baltimore. So everybody take care and I will talk to you soon.