LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, Good Morning everybody. It is hard to believe that we are almost into July and the July 4th holiday, so time is passing quickly this year and lots to talk about this morning as always.

I am going to start with a sort of a press release that was put yesterday by the Department of Labor. This was just Tuesday, yesterday and the Department of Labor indicated that it was going to reinstate the issuance of opinion letters in a wage and hour arena. Some of you may know that for many, many years, the Department of Labor, in fact for seven years, the Department of Labor would put out opinion letters as a result of individual employers asking questions regarding the administration of the Fair Labor Standards Act under particular facts and circumstances. What they did was they had a seven year of history publishing these wage and hour opinions which were of, I think, a large help to employers in different circumstances whether the issue was, whether or not somebody could be considered to be an independent contractor or you are dealing with an exempt, non-exempt classification, etc., but the Department of Labor stopped that practice in 2010. I think as a result of change in administrations as well as a lot of request by the employer community they have now reinstated that. The benefit of this is that if you are in a situation and usually the opinion letter is requested by counsel as opposed to the company itself, but if you are in a situation where you may be in a gray area with regard to classification or the payment of overtime or an independent contractor issue, you certainly now can ask for a written opinion letter by the Department of Labor. Now, it doesn't mean that if you ask for an opinion letter on Wednesday that you are going to get an answer on a Friday. It does take some time, but at the end of the day it builds a sort of body of law that is useful to employers throughout the country, so those of you who ever go on the website of the Department of Labor can see their press release, but the headline on this from the Department of Labor was the U.S. Department of Labor will reinstitute the issuance of opinion letters, U.S. Secretary of Labor Alexander Acosta announced today, meaning yesterday. The action allows the department's Wage and Hour Division to use opinion letters as one of its methods for providing guidance to covered employers and employees. I think that is a useful thing and one that hopefully will provide guidance better than it has been in the past seven years after the Department of Labor stopped this practice.

I wanted to notify everybody that last week those of you who may do any business in Delaware, State of Delaware, the Delaware governor, John Carney signed a new piece of legislation, a new law that will take effect in December of this year that similar to laws in New York, Massachusetts, Philadelphia, Puerto-Rico and Oregon would prevent an employer from asking a prospective employee for his or her salary history. Those of you out there I know that I have talked about this in prior telebriefs with regard to other states that have passed

similar legislation. The theory is, and it is only a theory it seems to me that by allowing employers to request salary history, you perpetuate any kind of disparities that may have existed historically between male and female salaries for any particular job classification. I question whether that is a valid assumption, but that is the assumption that underlies the passage of these particular pieces of legislation. This particular Delaware law, many of you out there may do business in the State of Delaware will make it an unfair employment practice for either an employer or an employer agent. Now when they talk about employer agent, what they are really talking about is staffing agency for instance that an employer may use in order to get candidates to ask about the compensation history from the applicant for a particular job. Now, it does indicate that once a conditional offer is made, that you can confirm compensation history after that offer of employment has been made, but of course that very much limits your ability as an employer to ask about this at all and it also prohibits a Delaware employer to make an employment decision based on compensation history. I think it is a practical matter because it extends liability not only to the employer, but to an employer's agent. Probably if you are doing business in Delaware in your contract for instance with the staffing agency should make clear that the staffing agency will be contractually bound to abide by this new statute for a new law, so you have to revisit any contracts you would have between yourself or your Delaware employer and a staffing agency that doesn't have that particular provision. The violations for this particular statute are fairly stiff, so the monetary penalties are between $1,000 and $5,000 for the first offense and between $5,000 and $10,000 for each subsequent violation so, those are pretty stiff penalties it seems to me and I think that this is just in keeping with a national trend, which seems to be that they want employers not to be able to ask about prior salary history, again which I think is a mistake but it does seem to be a national trend and those of you who cross over jurisdictional lines between Maryland into Delaware need to pay attention to this, because again this is going to be go into effect at the end of December of this year.

A development in two Trump appointments to the National Labor Relations Board. I have spoken in the past, and we have devoted a good deal of time on these telebriefs, particularly in 2016 and 2017 to many other rulings of the National Labor Relations Board, which as you know affect not only unionized employers but non-unionized employers as well, because Section 7 of the National Labor Relations Act prohibits employers from interfering with the rights that employees have under Section 7 to engage in what is called concerted protected activity meaning that employees have the right even in a non-unionized environment to band together to talk about wages, hours and terms and conditions of employment. Under the Obama National Labor Relations Board, which was controlled by Democrats, there was a great expansion of the Section 7 rights of employees and we talked about those a lot in 2016 and 2017 in my telebrief. Well now, President Trump has nominated two people to become members of the National Labor Relations Board, one of those people that he has nominated is an attorney named William Emanuel. William Emanuel comes out of a firm called Littler Mendelson, which is a

management labor law firm, a national labor law firm with offices throughout the country. He happens to come out of the Los Angeles Office. The other person that Trump has nominated to the board is a fellow by the name of Marvin Kaplan. He also has a management side perspective on labor relations. Both of these have been nominated and along with the existing NLRB chair Philip Miscimarra would comprise a 3:2 Republican majority if both of these individuals are confirmed by the Senate. The importance of 3:2 Republican majority at the National Labor Relations Board is many, many decisions that have previously been passed by a Democratic controlled National Labor Relations Board throughout the last several years in my opinion would probably be rescinded or modified greatly. Among those are all the pronouncements of the Obama National Labor Relations Board on handbooks. As you know, I have talked substantially in the past couple of years on many, many decisions of the National Labor Relations Board having to do with handbook provisions where the National Labor Relations Board has said that under a microscope they are going to say that particular handbook provisions of even a non-unionized employer do not pass muster under the National Labor Relations Act because they are deemed to chill rights under Section 7 of the National Labor Relations Act having to do with concerted protected activity. I have little doubt that if these two individuals are confirmed at the National Labor Relations Board that many of these decisions will be rolled back and what you will see is a much more conservative tone among the National Labor Relations Board decisions, which I think will be a good thing for all of you out there who have probably even modified your employee handbooks to deal with a Democratic-controlled or Obama-controlled National Labor Relations Board, so we will have to wait and see whether these two individuals are confirmed, but given the fact that the Republicans control the majority of the Senate, I believe they will be confirmed and then we should be at least in a much better situation from an employer standpoint of having many of these decisions rolled back.

As long as we are talking about sort of hopeful information, there is a case pending before the Supreme Court having to do with class action waivers. The National Labor Relations Board in the past several years has basically indicated that employers who impose class action waivers on their employees meaning that in situations where an employee is bringing an action on behalf of a purported class that that purported class would not be able to be permitted to be heard because employers have arbitration provisions subjecting the employee to having disputes resolved by binding and final arbitration as opposed to judicial litigation. While many of those provisions were litigated before the National Labor Relations Board, which took the position that those particular provisions run afoul of Section 7 of the National Labor Relations Act. That case and those companion cases are now before the Supreme Court. In an unusual situation, the United States Department of Justice reversed its position before the Supreme Court. It first took the position that they sided with the plaintiffs who basically said that those provisions ran afoul of Section 7 of the National Labor Relations Act. The Department of Justice has now reversed its position and said that the national policy favoring arbitration is an indication that those provisions should be upheld and so when this case comes before the

Supreme Court in the October term in 2017 the Department of Justice now will have reversed its position and taken its stance that class action waivers are permissible under the national policy favoring arbitration of disputes including employment disputes. It is a pretty unusual position for the Department of Justice to reverse its position but nevertheless that is what it has done and I think it is a good indication that when these cases come before the Supreme Court in the October term that they may very well uphold these class action waivers, and I think in addition we have Gorsuch on the Supreme Court now and he was not on the Supreme Court when these cases were originally filed, so there is a good chance that there may even be a 5:4 decision in favor of this class action waiver. Those of you out there who use them or who have binding and final arbitration as a means of disputing or a resolution in resolving disputes in the workplace may find that they are going to be upheld by a Gorsuch Supreme Court come probably 2018 when this decision will come down so, an unusual position where the Department of Justice has totally reversed its decision in favor of the validity of these class action waivers.

I wanted to bring to your attention—I know we talked a little bit about in the past—leave issues, when an employee goes out on leave and what happens if there is a request for an extension of time to accommodate that employee. There was a decision that was rendered on May 2, 2017 in the First Circuit involving AstraZeneca. Those of you out there know that AstraZeneca is a large pharmaceutical. This was reported in the Bureau of National Affairs and the headline on it is AstraZeneca did not violate a Federal Disability Rights Law when it terminated a sales employee who did not return after five months on short-term disability leave rather than extending her leave for another year, a federal appeals court ruled. Many of you have situations, we have talked about these in the past, where an employee goes out on a leave, it could be an FMLA leave, and near the expiration of that 12 weeks of leave, requests an extension of the leave because of a medical reason. Under the Americans with Disabilities Act, the Equal Employment Opportunity Commission has said that on a case-by-case basis an employer needs to consider whether or not to grant an extension of leave. In this particular case, the court said the Americans with Disabilities Act does not require an employer to grant indefinite leave and hold a job open if an employee has no estimate of when she will be able to return to work again. In this case as reported by BNA, "Delgado" that is the employee who was diagnosed with depression and anxiety related to a small brain tumor, AstraZeneca granted her short-term disability leave, but after Delgado was out for about five months, the employer inquired about when she might be able to return. Delgado's treating physician said her symptoms would not clear up for another 12 months and she might be able to return to work then. I emphasize might be able to return to work then. As the court said, Delgado failed to meet her burden of showing a 12-month leave extension would be reasonable the court said. She presented no evidence the additional leave would "likely enable" her to return to work and BNA reported a 12-month leave coming after AstraZeneca already granted Delgado five months of disability leave, also cannot meet the "facially reasonable accommodation" test, the court said, and I think this is important. It is obviously the First Circuit is a different circuit than the

Fourth Circuit in which most of you do your business. Nevertheless, it is reflective of many of the cases including Fourth Circuit cases, which say that obviously on a case-by-case basis you have to consider a request for an extension of leave but you don't have to grant leave or an extension of leave as an accommodation to a disability where it is indeterminate when that employee might be able to return to work. For instance, if you have an employee who goes out on FMLA leave and in week 11 of that leave says look or produces medical certification that the employee has a little complication and will be able to return to work in three or four weeks, certainly in that kind of situation on a case-by-case basis you may very well want and probably should grant the extension of that particular leave. However, if you get a medical documentation or certification in week 11 that says its indeterminate when an employee may be able to return to work or the employee may be able to return to work in six months that's a totally different situation, and you may have staffing difficulties, which say to you, I can't wait as an employer for six months to be able to reinstate that employee. It is clear under pretty much circuit law, not only in the First Circuit but the Fourth Circuit and other circuits, that kind of indeterminate situation is not a situation that you have to condone or tolerate and that you certainly would be within your rights to say to an employee, this is not a reasonable accommodation, we simply cannot tolerate that kind of an extension as an accommodation, therefore we're terminating your employ. I had this situation with a client just a month ago, where the employee who had a back injury and we could not tolerate a four-month extension after, this was a middle level manager, could not accommodate an extension of four months after a two-month further extension had already been granted to the FMLA leave. The importance of this decision is that it reflects the current state of the law and many of you who on a practical basis face these issues in HR or elsewhere, where an employee is requesting an extension of either FMLA or other kinds of medical leave, you don't have to grant something where its indeterminate in nature or where the employee is asking for such a long extension, that you simply cannot tolerate it as a practical matter of business.

The last thing I wanted to remind you of are those employers out there who submit position statements to the EEOC, and I'm sure most of you do that through your Employment Council, but I wanted to make sure that you understand that since 2016, the EEOC has been sharing these position statements with the Plaintiff or the charging party. Make sure, and I'm sure your Employment Council submits these, make sure that you're very careful of what goes in the position statement because these position statements are shared either with the charging party or the charging party's attorney. You need to be very careful of what goes in those position statements. Again, it's not so much an issue for most of you who submit these position statements through Employment Council, but I wanted to make sure that you understand that that's what happens at the EEOC. They share these with charging party, and particularly in a situation where they grant a right-to-sue letter to the employee which means that the employee has 90 days within which to file a lawsuit under the Freedom of Information Act. These are often requested by Plaintiff's Employment Council. Again the position statement takes on a lot

more importance than it used to before 2016 when these position statements were not routinely shared with the charging party. Okay, those are the developments for the day.

Michelle, can you take this off of mute?

All right, by the way, I wanted to apologize for the technical problem that we had in the last telebrief. Again, as Michelle indicates these are posted on our telebrief and you can certainly get them, if there are technical problems in the future. Any questions or comments that people have about anything covered either in this forum or you can direct them personally to me at my email at hkurman@offitkurman.com or by phone at (410) 209-6417. Any questions, comments from any of the material covered?

Mike: Hey Howard, its Mike.

Howard Kurman: Yeah Mike.

Mike: Question regarding the Delaware law that will go into effect later this year.

Howard Kurman: Right.

Mike: Is that, I mean we have a small operation in Delaware and we often interview people here in Maryland, and also our employment application have, you know, past history, you know, where we request salary, not everyone fills that out, but it's still on there.

Howard Kurman: Sure.

Mike: Do you suggest, we completely alter that, and change our employment application?

Howard Kurman: Yeah, I think that, I don't know that you need to change your application so much as you might even have an addendum or a little statement that says that for those applicants who are seeking employment in Delaware question number 11 should not be answered. I don't know that you need to go through the trouble Mike of changing your application, but I do think you're going to have to make it known to those applicants in Delaware that they need not and should not supply that information and you'll have to tell your folks that are interviewing applicants for Delaware positions that they can't ask those questions.

Mike: Okay.

Howard Kurman: Okay.

Mike: Right, thanks Howard.

Howard Kurman: Any other…sure…any other questions or comments?

Anne: Yeah Howard, its Anne. Thank you for this information about these indefinite leaves being requested.

Howard Kurman: Yeah.

Anne: This is a real problem for employers now, and one advantage employees have is that many of us have the medical insurance continues under these leaves and employees don't want to disengage because they get medical benefits at a very favorable rate.

Howard Kurman: Sure.

Anne: It's a problem.

Howard Kurman: It's a problem Anne, but I think that you have to separate out the insurance issue from the reinstatement issue. While it may serve as a financial hardship on the employee, because for instance if you terminate the employee, obviously the employee then has to go on COBRA, if he or she wants to continue coverage, that should not be a factor in the decision of whether or not you can accommodate the employee. The only issue in deciding whether to accommodate the employee is whether the request for the accommodation is reasonable, not whether or not there may be a financial hardship on the employee as a result of medical insurance being terminated or at least the employer's portion of that medical insurance being terminated. I think that you can disregard the medical insurance issue as a factor in your determination and the only factor that you may consider is whether or not under the facts and circumstances of your case the request for an accommodation is reasonable.

Anne: Got it, thanks.

Howard Kurman: Okay. Sure.

Anne: Thank you.

Howard Kurman: Sure. Any other questions or comments? Okay, well if not, its hard to believe, but we will see each other at least figuratively, on I think it's the second week in July, which I take it is I think July the 12th. So thank you everybody for participating. We will see you then.

Mike: Thank you Howard.

Anne: Thank you.

Mike: Bye-bye.

Howard Kurman: Have a good July 4th holiday. Bye-bye.