LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Okay, we are going to get started. Okay, well, good morning to everybody. It is September 13, 2017, hard to believe that it is September, but it is and before you know we will be into October so, there is a lot to talk about this morning as usual.

There have been a number of proposed statutes introduced into Congress in the last few weeks primarily, of course by Republicans seeking to turn back the clock on things that happened under the Obama administration. Last week, Senator Orrin Hatch, as you know, a Republican from the State of Utah, introduced what he called the Employee Rights Act and under this Employee Rights Act the intent would be to turn back much of what transpired under the Obama administration to liberalize the National Labor Relations Act. It would in effect get rid of the so called quickie elections that is the period of time between the time that a union files a union petition to represent employees and a bargaining unit and the time that an election actually takes place. It would prohibit unions in a representation campaign from obtaining access to employees' phone numbers and email addresses, something that is controversial and that happened during the Obama administration. It also, I think in a pretty controversial way would state that if an employer was already unionized and had 50% turn over among its employees that there would be a requirement for a new representation election to ascertain whether or not the employee still wanted to be represented by that same union. Similarly, it would also do away with the opportunity of unions to gain representational rights simply by showing authorization cards to an employer instead it would require that a NLRB conducted election be instituted. Along similar lines another act was introduced by Michigan Congressman, Tim Walberg, in July called the Workforce Democracy and Fairness Act, again that would propose to get rid of the so called quickie elections and there was a Save the Local Business Act, which was very recently introduced by a congressman from Alabama. This would interestingly revise the requirements under the National Labor Relations Act and the Fair Labor Standards Act having to do with a direct control standard for dual employment. You will remember and I have spoken about this in prior telebriefs that under the Obama administration and the Obama National Labor Relations Board they determined that two employers could be deemed to be dual employers if either one of them exercised what was deemed to be indirect control over employees as opposed to direct control, which was the standard for decades under the National Labor Relations Act. The final proposed legislation is something that was introduced by a Congressman in Iowa, Steve King, called the National Right to Work Act, which would on a national level as opposed to a state level outlaw any kind of union security provision and a collective bargaining agreement which would require union membership as a condition of employment. There are many states that already have such requirements or prohibit such requirement in the South primarily and some in the Midwest, but this would codify on a national level. Whether any of these statutes really gain traction will be seen, I think as a matter of priority in terms of the pending agenda of the Trump administration for health care reform, for infrastructure, institution of funds and also for tax reforms. I'm not sure that any of these are on a high priority list, but nevertheless they are interesting, they bear watching and I think that to the extent that any of them even are modified to some extent, they would certainly be a lot better for business than what

happened during the Obama administration with the great expansion of employee and union rights at the National Labor Relations Board and at the Department of Labor.

Speaking of the Department of Labor some of you may have read last week that the same Federal Judge in Texas, who granted an injunction against enforcement of the Department of Labor's revised overtime rules, struck down that rule in its entirety last week contending that with the increase in salary for exempt employees from $24,000 and change to $47,000 and change. That in effect that drastic change, that drastic increase voided the duties test for administrative executive, professional and computer professionals under the white collar exemptions under the FLSA. Where this case would go now will be up to the Department of Labor. I think ultimately and I have said this before, I think ultimately what will happen is that there will be a salary test to accompany the duties test but I think that salary test would be somewhere in the $30,000 to $35,000 range for exemption as opposed to the $47,000 test that was initiated by the Obama Department of Labor and which I thought was very, very drastic and too high and from a practical standpoint some of you may have already increased salaries to that level of $47,000, so its problematic as to what you want to do or what you have done, but I am just predicting that at the end of the day you will have a duties test and you will have a salary test and I think that it will be somewhere in the $30,000 to $35,000 range.

I wanted to mention a case that came out of the Connecticut Appellate Court, just last week in a case called Thompson v. Department of Social Services and in this case an employee who was out on a FLSA leave wanted to extend that leave because of continuing medical problems. I know that in prior telebriefs we've talked about the fact that the Equal Employment Opportunity Commission takes the position that the mere fact that somebody has extinguished his or her FMLA leave doesn't mean that you don't have an obligation under certain circumstances as a reasonable accommodation to extend that period of leave. The interesting thing about this case arising in Connecticut state court was that the employee wanted to extend leave, but in her doctor's note that she gave to the employer the doctor's note said that she would not be able to return to work "until reevaluated," that her inability to return to work was "ongoing" and thirdly that she should experience "significant improvement" in one to two months and the employee never provided any more specific information about her medical status. Many of you I know probably get doctor's notes from time to time from people who are out on FMLA leave along these same lines, and I think the principle enunciated by this case is that yes you may have a duty to accommodate somebody who requests an extension of leave, but you don't have to accommodate somebody where the medical information that you have is so ambiguous or so indefinite, or where the employee's return to work is so indefinite into the future that it becomes unreasonable to accommodate that particular employee and that's what this case stands for. There are also federal cases along the same line of this. If you have employees that are out on a family leave, leave of absence and they say well look I need another week or I need another two, and it is backed up by medical information, you very well may have an obligation to accommodate that employee, but if you have somebody who says, I need a longer extension, and the medical information is very indefinite and can't be clarified anymore, it would then be unreasonable to accommodate that individual and you can go ahead and safely terminate that particular individual. Contrasted with that Connecticut case is the case that was filed by the Equal Employment Opportunity Commission two weeks ago, and this involved a nonprofit called the Illinois Action for Children where they fired an employee who had been on leave for breast cancer

treatment, instead of providing an extension of her leave request, while she was getting these treatments for breast cancer, she requested a short period of additional leave in order to receive additional treatment, the employer terminated her. Contrasted, as I said, with the Connecticut case, the Equal Employment Opportunity Commission basically sees this as a failure to accommodate for a reasonable period of time where it would not be an undue burden on the employer to do that. Two different kinds of situations, I think very instructive as to how you deal with the employee who is out on an FMLA leave and who is extending or seeking to extend that leave based on medical information.

Speaking about the FMLA, some of you may say or are faced with situations where you believe that an employee is abusing that FMLA leave either because they have provided fraudulent information in order to obtain the leave or where they are engaging in activity during the FMLA leave that would be inconsistent with such leave. For instance, you have an employee who has requested FMLA leave to deal with a sick parent or a sick child, and you gather information which leads you to believe that that employee is on vacation some place out of the country or on a cruise, etc. I have had those situations in the past and the question becomes, what would you do as an employer? Well, the answer is that you don't do anything differently than you would in investigating any other kind of workplace misconduct. The fact that an employee is on approved FMLA leave does not immunize that employee from having corrective action taken if the employee is abusing such leave or suspected of abusing such leave. The issue however is how do you conduct that investigation, and you conduct it the same way that you would in looking at any other act of alleged misconduct. You talk to witnesses, sometimes if there is videotape, you look at the videotape that you have. You may even want to use an outside investigator to ascertain whether there is something going on with that particular employee which would be inconsistent with the employee's allegation that the employee is unable to work during a specified period of time. The thing that is important in any of these cases, just as though in any workplace investigation you would by necessity want to and be required to give the employee an opportunity to be confronted with any kind of evidence that you have, so you should speak to an employee or confront that employee with any evidence that you might have, and even if you have, lets say, a videotape taken by an outside investigator of an employee who supposedly was out on FMLA leave to take care of a broken leg and you have videotape of that employee up on a roof putting up a TV antenna, you would certainly want to sit down with the employee and say here is the videotape we have, what do you have to say for yourself? The conclusion is that you can and should take action against an employee who is abusing his or her FMLA leave but you need to go through due process requirements and make sure that you have spoken to all the relevant witnesses that you can in dealing with this situation.

I thought it would be appropriate given the fact that we have seen two horrendous acts of nature between Harvey in Houston and Irma in Florida having to do with employers shutdown of business, particularly as we head into the winter season here on the East Coast, and I want to review these rules with you just so there is a common understanding from an HR standpoint and from a wage and hour standpoint. So, here are the various scenarios that I would like to review. You have either due to a hurricane or a snowstorm or whatever a situation where your office is closed for a few days because of that particular event. How do you deal with that event? Well, with regard to your nonexempt employees, your nonexempt employees, as you know, are only obligated to be paid for the hours that they actually work, so if your office is closed for a

few days and the employees cannot work, you are under no obligation to pay the nonexempt employee. How about the exempt employee? What do you do with the exempt employee? Well, the exempt employee, as you probably know, is entitled to be paid for an entire week unless, okay, if the place of work is closed for more than a week and the exempt employee has not done any work during that week, you can in fact get by without paying the exempt employee, but again, if your place of work is closed for a week or more, you need not pay the nonexempt employees and you need not pay the exempt employees. How about if you are closed for two days because of a snowstorm, and again, your nonexempt employees don't come in, you are not obligated to pay them. Your exempt employees don't come in. You are still obligated to pay the exempt employees their full salary. How about if you are open, it is just that the nonexempt employees don't come in? Again, you are not obligated to pay them, but suppose you are not, you know, you are open during the week, but you have an exempt employee who cannot make it in for two days, what the FLSA would say is that you can properly dock that exempt employee for the two days the same as you would for a personal day as long as you pay him for the other three days. Now, question whether or not you really want to dock the exempt employee. That becomes an issue of employee morale, but under the FLSA, if the exempt employee doesn't make it in, but you are still open for an entire day, you are not obligated to pay that exempt employee. But what if the exempt employee comes in three hours late but still works the remaining five hours, then you are obligated to pay that exempt employee for the entire time for the entire week. So again, the difference between nonexempt and exempt is that nonexempt they are only paid for hours worked irrespective of whether they come in late, they leave early because of weather, etc. Exempt employees are obligated to be paid if they work any part of the week unless your place of work is closed for the entire week or unless you are open and the exempt employee does not come in for an entire day. So, as we head into the winter season, keep those in mind if you have a policy that has to do with inclement weather or any other kind of act of nature beyond your control.

Along with the wage and hour issues that we are talking about, I had a client ask me a week ago about lunch hour issues. Again, I want to review what the wage hour law is on that. Under the Fair Labor Standards Act, there is no requirement to have a paid lunch hour or lunch period; however, if you do have lunch periods for employees and the lunch period has to be at least 20 minutes, if you are doing that and you have to excuse the employee from any kind of duty or responsibility, so that if the employee is answering the phone during a purported lunch period or answering an email, that is not a complete abrogation of his duties and responsibilities and that can account for work time or paid time under the Fair Labor Standards Act, and there are many cases today where employers have gotten sued because employees are not excused from their duties and responsibilities having to do with a lunch periods. If you have lunch periods, make sure that employees are not obligated and in fact are not doing work either answering phones or emails, etc., during the time that they are on a meal break, very important because that can create class-wide liability for you.

The last thing that I wanted to mention is that last week the Federal Office of Management and Budget importantly stayed the regulation, that we have talked about, promulgated by the Obama Equal Employment Opportunity Commission that would have required employers as part of their EEO-1 reporting to include salary data along with the traditional data on ethnicity, sex, etc., that you include on your EEO-1 form. This would have been, I think, a very burdensome requirement and a time-consuming requirement for employers. It is no surprise to me that the Office of Management and

Budget under the Trump administration has stayed that particular requirement. You will not be required until otherwise notified to include that data on your new EEO-1 report. So, even though the new EEO-1 forms have on them a place for pay, you don't need to include that unless and until we get information from the federal government that they are lifting that stay and otherwise imposing that requirement on you as a reporting employer.

Okay, those are the developments for the day. Okay, as I always do, if anybody has any questions, comments, feel free to bring them up here or if you would rather do it in private, you can call me at 410-209-6417 or email me at hkurman@offittkurman.com. Any questions out there? Okay, well if not, hope everybody got something practical out of this, and we will see you on the fourth Wednesday in September, so have a good next couple of weeks. Okay, bye-bye.