LABOR & EMPLOYMENT TELEBRIEF
By
Howard B. Kurman, Esquire
September 29, 2016

Howard Kurman: Good morning. Today is Wednesday, September 28, 2016. As Michelle Correnti has indicated this telebrief is prerecorded because I have to be out of the office Wednesday morning at a meeting and logistically I wanted to let you know that normally we would have the telebrief scheduled for Wednesday, October 12th, being the second Wednesday in the month but Wednesday, October 12th is the Jewish holiday of Yom Kippur so there will be no telebrief on Wednesday, October 12 either live or prerecorded so the first telebrief in October will be the fourth Wednesday in October 26th, thank you.

As you know in the past we have talked about the Department of Labor overtime rules changing the salary test for exempt employees, which is scheduled to go into effect on December 1st of this year; a couple of months from now. Significantly on September 20th just last week, 21 states and a group of business entities or business associations filed two separate lawsuits in a federal district court in Texas challenging the validity and enforceability of the Department of Labor Rules and Regulations. The challenges were basically rooted in a few different arguments. One argument in the lawsuit was that the proposed rule by the Department of Labor "infringes on state sovereignty and federalism by virtue of the fact that the Department of Labor has mandated by its rule the wages that each state must pay to their own employees." The second argument that has been made essentially is that the salary levels were raised so drastically and so dramatically from essentially $24,000 to about $47,000 as to exceed the authority of the Department of Labor. The third argument that has been raised is that the automatic indexing which is part of the Department of Labor rule exceeds the Department of Labor's authority as well. As you know in the Department of Labor rule, which is deemed to go into effect December 1st, the Department of Labor said that every three years beginning in 2020 the salary test will be revisited and automatically indexed and increased if that index goes up and this is the third aspect of what is going to happen with regard to the lawsuit. I think that from a practical standpoint it bears noting that we do not know what the success or lack thereof of these lawsuits will be and certainly from a proactive standpoint you need to make sure that you go ahead and you look at your job descriptions, you look at your salary levels and plan as if these rules were going to go into effect on December 1st irrespective of these lawsuits. I certainly will keep you up-to-date on the progress of the lawsuits but importantly I think you need to go ahead and do what you need to do in order to comply as of December 1st.

Now that we have the first presidential debate which has been completed as of Monday night, I am sure many of you watched, some have asked or speculated about what a Clinton administration would look like from the standpoint of various labor and employment issues. I think it is fair to say that if Hillary Clinton were elected as the next president we probably would have much of the same with regard to labor and employment initiatives as has existed under the Obama administration. Just to mention a few different issues with regard to the support of the labor movement, it is significant that the Hillary Clinton campaign website has a statement on there that in "when unions are strong America is strong" and that she has made it clear on the campaign stump that she supports a very, very robust labor movement. It has been pretty clear during the Obama administration that whether it is the National Labor Relations Board or whether it is the Department of Labor or the equal Employment Opportunity Commission all of these administrative agencies have been aggressive with regard to their pro-employee and in many cases pro-labor staff and I really do not see that changing under a Hillary Clinton administration.

For instance with regard to paid leave, Hillary Clinton has on numerous occasions supported amendment of the Family and Medical Leave Act to include up to 12 weeks of government paid leave for employees and she has also said that the funding for that would come from a stronger tax on the wealthy in order to support the payment of this paid leave. She has also proposed that there be provisions made for child care and how that would be budgetarily taken care of I am not sure. She has also supported a $12 minimum wage so as you know the minimum wage federally now is $7.25 she has reportedly supported a minimum wage increase of up to $12 an hour so that is not a real big change from the Obama administration with regard to equal pay. This came out during her statement in the debate the other night as well as on the stump where she has been a pretty ardent supporter of the current administration's attempts and efforts to essentially establish equal pay with regard to or irrespective of gender of particular employees. So all in all it seems pretty obvious to me that Hillary Clinton administration would not dramatically depart from the initiatives, which have been proposed and enacted by the Obama administration in the last eight years.

I am going to point out something which is developed since our last telebrief. I think in the last telebrief I reported on a Massachusetts statute, which would preclude an employer from requesting or requiring as a condition of employment that a candidate for employment disclose his or her salary history, and I indicated in my last telebrief I believe that if this takes on the appearances of a trend nationally it could be troublesome and problematic for employers. Well lo and behold the New Jersey state assembly is considering a bill, which was introduced on September 15, 2016 and "it is designed to strengthen protections against employment

discrimination and thereby promote equal pay for women." It provides that an employer may not require or seek the salary history of a candidate for employment until there is actually been an extension of a conditional offer by the employer to the employee and this is I think problematic from most of your standpoint because one of the things that you want to see as you consider a candidate is the progression of salary that that person has had from one job to another, it also gives you an idea of the benchmark with regard to the current salary, which you may be willing to offer a particular candidate. So this is by no means something which is been enacted in many states today but it does seem to take on the appearance of somewhat of a trend so keep this in mind and keep an eye and ear open for whether or not this seems to get traction nationally.

I thought I would bring to your attention an interesting workplace drug study that was done by Quest Diagnostics and published in mid-September just a week and half or so ago and the statistics are pretty revealing with regard to the increase in positive workplace drug results, which had been increasing every year since 2011. It is called the Quest Diagnostics Drug Testing Index. They apparently do an annual survey of workplace test results and what they did was they examined nearly 11 million drug test results in 2015 and I will note the following conclusions or observations that this study revealed. They say that the rate of amphetamine, marijuana and heroin detection has increased every year for the past five years. They indicate that 45% of all United States workers who tested positive in 2015 showed evidence of marijuana use. They indicate that there were positive test results for heroin or that the positive test results for heroin increase 146% over the last four years. While positive test results for oxycodone decreased slightly. They indicate that amphetamine positive test result increased 44% since 2011. They indicate that post accident positive rates have increased 30% since 2011 and they indicate that 9% of job applicants could not pass a pre-employment hair drug test in 2015. I think these statistics are a little daunting if they indeed show universally an increase in positive drug tests over this period of time and whether or not there is a cause-and-effect between states, which have legalized at least the medical use of marijuana or not we do not know but I think that all of you who have drug and alcohol policies and drug and alcohol test procedures I think that you need to pay some attention to these statistics particularly with regard to post accident testing and pre-employment testing as it looks like the trend is for more positivity among these drug tests for a variety of things including marijuana, amphetamine use and even heroin, which is very distressing and not surprising given the fact that the statistics that you read about and hear about on the news with regard to heroin use is that its use is dramatically increasing in the last few years. So again a word to the wise examine your drug and alcohol policies and examine how you in fact conduct drug and alcohol testing and see whether your own statistics bear the increase out that has been noticed by Quest Diagnostics.

There was an interesting case decided very recently by the Fifth Circuit Court of Appeals the case is called Derek Dillard vs. City of Austin again decided by the Fifth Circuit Court of Appeals. What had happened was the Fifth Circuit affirmed the decision of the trial court below denying the Plaintiff's case for contending that he had been terminated because of his disability and the Fifth Circuit had affirmed the lower court's decision and indicated that the City of Austin was justified in firing a former maintenance employee who was injured on the job because rather than the disability being the cause of his termination he was found to have engaged in numerous lies and misconduct on the job. So what happened factually was this guy, Derek Dillard, had been involved in an automobile accident that left him unable to perform his normal job, which was working in the City of Austin street and drainage maintenance division. So when he was able to do so and come back to work the City of Austin offered him a substitute job working as an administrative assistant and he accepted that but after numerous misconduct issues, which were documented including napping on the job and lying about the hours that he worked he was fired by the City. The court says as follows: "the same uncontroverted evidence of misconduct and poor performance that doomed Dillard's discriminatory termination claim is thus also decisive for his reasonable accommodation claim. The court went on to say we stress the evidence of misconduct in (making personal calls, non-attendance, napping, lying, playing games)" because even an employee unable to perform office tasks needs no special skill to avoid misusing company time, dishonesty, falling asleep or absenteeism. As he did not attempt to fill his new role in good faith Dillard cannot rely on the fact that he did not successfully adjust to that role to show that the City should have continued the interactive process by offering him a further alternative placement. In this case, in effect, what the employee argued was that he should have been able to get a second job once he came in and the failure of the City of Austin to accommodate him was also an independent violation of the ADA. Significantly despite the Fifth Circuit relied upon documentation regarding his misconduct, his attitude and his lying and said as we all would say that there was a legitimate or more than one legitimate nondiscriminatory reason for his termination.

I think this case is noteworthy because you have a Federal Appellate Court going through and assessing what the documentation was for a particular person's termination and in the face of a disability claim and a failure to accommodate claim essentially saying that look you can make these claims all you want but if there is underlying documentation of nondiscriminatory reasons and legitimate business reasons for the termination they are going to defer it to the employer on that and as I have indicated in prior telebriefs to all of you as you go about the issue of accommodating somebody coming back from a illness or an injury where

there is a perceived disability that person obviously is in a protected classification. But that protected classification does not immunize that individual employee from the standpoint of adhering to the same code of conduct as all other employees and if you document it correctly and if you use progressive discipline at the time of the termination you will be in a much better shape to avoid any claim that the reasons for the termination were pretextual as opposed to the real reason being the disability or failure to accommodate. I think the Fifth Circuit's decision in this case is legitimate, it has legitimized what we have talked about on numerous occasions in telebriefs, which is documentation is the key particularly when dealing with people who are in a protected classification; whether that protected classification is disability or any other protected classification.

The last case I want to mention is a case that was filed by the Equal Employment Opportunity Commission right here in the Federal District Court in Maryland involving M&T Bank and the EEOC's allegations in this complaint again just filed last week. Is that M&T violated the ADA when it terminated a branch manager who had gone out on short-term disability related to her pregnancy. This is a woman who was a branch manager for M&T Bank, she went out on a medically related leave related to a condition that would increase the probability of a miscarriage and after she gave birth she alleges that the company failed to place her in a position, which matched her qualifications despite the fact that M&T apparently had numerous openings throughout the area. M&T refused to put her in one of these positions and eventually even though she had applied for many of these positions she was terminated and never offered a position. The complaint also alleged that M&T had 17 similar additional vacancies in the Baltimore area in the relevant period of time but failed to assign her to any of these particular vacancies. I think the noteworthy thing about this is not necessarily that it was filed in the Federal District Court in Maryland, I think the noteworthy thing is that I have indicated to you that one of the strategic initiatives of the Equal Employment Opportunity Commission as announced in 2015 and 2016 is to come down hard on companies, which are allegedly discriminating against women on the basis of pregnancy and this is a prime example of that prototypical kind of case. I do not know what will happen in this case obviously allegations do not mean that they have the ring of truth to them they are just allegations and M&T will have an opportunity to vigorously defend itself against these allegations but I can tell you that it does seem to be a trend that the Equal Employment Opportunity Commission in various regions throughout the country seems to be coming down hard on those companies, which are perceived or alleged to have discriminated against women on the basis of disability meaning pregnancy or pregnancy related disabilities. So be wary if you have an employee who is pregnant and who has some perceived or real disability be wary of the fact that the Equal

Employment Opportunity may be looking over your shoulder and how you treat that particular employee.

All right those are the developments for the day. As I indicated in the beginning unfortunately the religious holiday falls on October 12th, therefore, we will not be having a live or prerecorded telebrief on Wednesday, October 12th. As I always do at the end of these telebriefs, if you have any questions or comments obviously because I am not live today feel free to email me at hkurman@offitkurman.com or call me on my office number 410-209-6417. Thanks a lot for participating and I will see you at the end of October.