LABOR & EMPLOYMENT TELEBRIEF
By
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Howard Kurman: Welcome everybody, as we were saying a couple of minutes ago, hard to believe that we are approaching the end of the year and certainly since the election a lot of stuff going on, particularly in Labor & Employment field, so lets get right to it.

We have talked about in the last telebrief the fact that a Federal Court in Texas issued a preliminary injunction against enforcement of the Department of Labor's new white collar rules. Remember those white collar salary changes were supposed go into effect as of December 1st of this year. What happened was the Federal District Court in Texas issued a nationwide injunction prohibiting the Department of Labor from enforcing those particular white collar salary rules pending a decision on a permanent junction by that court.

In the meantime the Department of Labor appealed that decision as it was entitled to do to the Fifth Circuit Court of Appeals, the Fifth Circuit would hear typically appeals from the Federal District Court in Texas and not only did the Department of Labor appeal that to the Fifth Circuit but they asked the Fifth Circuit to expedite the appeal and the hearing of that appeal because of the national importance of the issue involved.

In accordance with the discretion that they have the Fifth Circuit agreed to expedite the appeal as follows and I will give you these dates and I think the dates are important because, I will come back to why it may not even resonate or be conclusive with regard to the Fifth Circuit's hearing. The Department of Labor's brief under this expedited schedule is due on December 16th, only two days from now. The brief of the people or the parties that or the Plaintiffs in the case, the people that sought the injunction, the business groups is due January 17th, so only a month after the Department of Labor's brief is due. And then the Department of Labor's reply brief is due on/or before January 31st. The court ordered that oral argument would be set for the first available sitting after the close of the briefing on January 31st, but that does not mean the oral argument would be heard anytime in the first or second or even third week of February, it may mean sometime in late February or March. In the meantime, on January 20th as we all know president elect Trump will be inaugurated as next president and it is very like for reasons that I will go into in a couple of minutes that the Department of Labor may even pull the appeal or withdraw the appeal based on the fact that there will be absolutely no support for this rule among the new Department of Labor hierarchy and among Trump, himself. It remains to be seen whether even if the appeal gets heard in the Fifth Circuit whether or not

the rules as we all understood them to be implemented on the December 1st will ever, in effect, be effectuated.

Along with that I think that it is useful to take a look at who Mr. Trump has nominated as a new Secretary of Labor. You all know that at the present time the Secretary of Labor is Tom Perez. Mr. Perez has certainly built up a reputation during his tenure as Secretary of Labor as being very anti-employer, very pro-employee and pro-union. In his announcement nominating Mr. Puzder, here is what Trump said, "Andy Puzder has created and boosted the careers of thousands of Americans, and his extensive record fighting for workers makes him the ideal candidate to lead the Department of Labor." He went on to say, "Andy will fight to make American workers safer and more prosperous by enforcing fair occupational safety standards and ensuring workers receive the benefits they deserve, and he will save small businesses from the crushing burden of unnecessary regulations that are stunting job growth and depressing wages." It is useful to note that Mr. Puzder, at the present time, is the chief executive officer of a company called CKE Restaurants, Inc., which, of course, is the parent company of Hardee's and another fast food restaurant chain as well. He happens to be a lawyer, he graduated from Washington University Law School and he was a trial attorney in St. Louis, Missouri before taking over as the CKE executive in the year 2000.

It is useful to take a look at what is on the record from Mr. Puzder because he seems to be a prolific writer of editorials, as well as testifying before Congress on various issues. Let's just take a quick look at what he has said historically and so what may give us a pretty good clue of what his attitude may be during the first four years of the Trump administration. With regard to business regulations in general, in February 2012 he testified before the House Energy and Commerce subcommittee on oversight and investigations with regard to regulatory reform. What he said was, "Our system lacks any meaningful mechanism for tracking the cost of regulations as a whole and balancing that against the need for businesses to use their profits to expand, grow and thereby create jobs and prosperity." He went on to say, "nonetheless, while most government officials recognize that raising taxes has a dampening effect on economic growth, there seems to be no similar acknowledgement with respect to the impact of regulatory costs." Pretty significant statement as you know under the Perez administration and the Obama administration regulations have proliferated to a large extent.

How about with regard to the overtime rule that the Department of Labor sought to enforce as of December 1st. Again, Mr. Puzder has put out some editorials or some letters to editors on these. He wrote an op-ed piece in Forbes magazine and I quote from him, he says "In practice this meaning these regulatory enactments and practices means reduced opportunities bonuses, benefits, perks and promotions." He also wrote in a separate op-ed piece in

September for the Wall Street Journal saying that regulation would leave businesses that need and hire the most employees, particularly restaurants and grocery stores, at a competitive disadvantage to those that hire relatively few workers. About with regard to minimum wage, in a June 2014 editorial, he wrote in the Wall Street Journal that in the increase in the federal minimum wage to over $10 an hour would precipitate a decrease in businesses' willingness to hire workers for minimum wage positions, which he described as a gateway to better opportunities and he had this quote, "the bottom line on labor makes something less expensive and businesses will use more of it, make something more expensive and businesses will use less of it." He has also attacked the NORB's declarations on joint employers, which we have discussed in prior telebriefs and the Department of Labor, as you know, and the EEOC has taken up the mantle on this joint employer issue. He has opposed that and he also has been a staunch opponent of Obamacare.

Obviously, he needs to go through the confirmation process in Congress, but given the fact that there is a Republican Congress in both houses, it would seem to me that barring some other big disclosure that would otherwise give cause for concern, Mr. Puzder will probably be the next Secretary of Labor and I think that you will see a sea change with regard to regulations, pronouncements, philosophies that heretofore under the last eight years have been probably extremely on the left side of being pro-union pro-employee. Obviously, we will have to stay tuned for this, but it bodes well at least tentatively for employers.

Speaking of the Department of Labor again, a Minnesota federal judge last Wednesday put into sort of an inactive status, the Department of Labor's persuader rule. Now, remember in the last telebrief I talked about the fact that another Texas federal judge different than the one hearing the DOL white collar exemption rules, a federal district court judge in Texas enjoined nationally the enforcement of the so-called Department of Labor persuader rule, which would have mandated disclosure by both companies and their attorneys with regard to anti-union advice and action plans promulgated by attorneys and other labor relations consultants. The federal district court judge in Minnesota last Wednesday stayed the case in order to give the administration of President Trump an opportunity to inform the court as to where it stands with regard to this rule. As the court stated, the court agrees with plaintiffs that there is significant reason to believe that the new administration will withdraw the persuader rule or at least decline to defend the validity of the persuader rule in its current form. In addition, another court has already entered a nationwide permanent injunction preventing implementation of the rule. He was obviously referring to the Texas federal court judge. My own educated opinion is that the persuader rule will be dead whether it is by injunction, whether it is by the Department of Labor under the new Secretary of Labor withdrawing it, either way, I think that we will not see the persuader rule at least in its current form

being enforced, which is a good thing for employers out there who use labor relations consultants or attorneys in the midst of an anti-union campaign.

I wanted to bring to your attention a press release that was put out by the Equal Employment Opportunity Commission just two days ago. On December 12th, the EEOC put out a press release which you can find on its website. It is entitled "EEOC Issues Publication on the Rights of Job Applicants and Employees with Mental Health Conditions," and I will just quote from certain portions of it. It states, "the US Equal Employment Opportunity Commission today issued a resource document that explains workplace rights for individuals with mental health conditions under the Americans with Disabilities Act of 1990. Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, which is an accompanying document, question and answer document, and I will just read from a couple of those in a minute, explains that job applicants and employees with mental health conditions are protected from employment discrimination and harassment based on their conditions. They may also have a right to reasonable accommodations at work. Reasonable accommodations are work adjustments that can help individuals to perform their jobs and remain employed." The resource document also answers questions about how to get an accommodation, describes some types of accommodations, and addresses restrictions on employer access to medical information, confidentiality, and the role of the EEOC in enforcing the rights of people with disabilities. The press release then goes onto say, the EEOC charge data shows that charges of discrimination based on mental health conditions are on the rise. During fiscal year 2016, preliminary data shows that EEOC resolved almost 5,000 charges of discrimination based on mental health conditions, obtaining approximately $20 million for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations. If you go on their website, there are a series of eight questions and answers, which I will talk a little bit more about probably in our next telebrief, but it is a pretty good primer on the fact that often times when we think of accommodating a disability with an applicant or an employee, we think generally of a physical disability, and I think the EEOC is making clear that irrespective of whether it is under Obama or whether it may be under Trump that their initiatives also include in a very strong way applicants or employees who may be discriminated against or differentiated against on the basis of a mental disability, which has every much as protection under Title 7 and under State Analog Statutes as do physical disabilities. We will talk a little bit more about that in the next telebrief, but I wanted to bring that to your attention in case you want to go on the EEOC's website and take a look at that.

I want to talk a little bit about the fact that, you know, we have talked in the past telebriefs about the White House initiative under Obama, which has strenuously argued for the abolition or the great limitation of the use of restrictive covenants. Those of you who use them in contracts of employment, I have

talked about the fact that the Obama administration recently issued what is called a Call to Action. The state legislators across the country basically asking for non-compete reform in many instances saying that they were unnecessary or overbroad. Interestingly, with Trump coming into office I think that there may be less of a Call to Action at least on the federal level because Trump in his business dealings has used non-competes quite extensively, in fact used restrictive covenants even among members of his own campaign staff as recently as the last year or two. I do not think we are going to be getting any pronouncements from the Trump administration on limiting the use of non-competes, but what I do think that we will continue to get is legislative action on the state level limiting to some extent or even in some cases prohibiting the use of non-competes and so I know I have talked about this before, but you all may want to take a look at your employment agreements and decide whether you really need non-competes as opposed to non-solicitation agreements, which would prevent employees from soliciting business from your existing customers or prevent employees from soliciting your existing employees or imposing confidentiality restriction on your employees, all of which are permissible and get less judicial scrutiny than actual non-compete agreements. I do not think that you are going to see any Call to Action from the Trump administration like the kinds of pronouncements that you have gotten from the Obama administration.

The other thing that I wanted to mention because I came across an article which sort of dovetailed with a couple of client issues that I have had recently which is the whole issue of accommodation of disabilities, and I do not want to go into too much detail about that in the interest of time, but I will mention a couple of things which I find to be useful. One is that I know you all have handbooks and in your handbooks you all have provisions on disabilities being protected like other protected classifications, but I do not know that you all describe what your accommodation policy is in those policies. It is useful to describe in detail not only for employees but supervisors how accommodations are requested and what the process is by which an accommodation would be discussed and perhaps granted in some respect. I find that many employers that I represent have handbooks that talk about disabilities but do not necessarily go into detail with regard to the accommodation process. I think that that is a useful and efficient way of dealing with the issue. I also think that training of not only supervisors and managers but employees, rank and file employees, on the accommodation issue pays dividends because the extent to which it can be institutionalized means that you have a much more organized process by which accommodations are requested and perhaps granted. Those of you out there who are participating in this telebrief probably will receive an email from me tomorrow, the next day which will talk about training initiatives that we offer and often engage in with clients with regard to many issues in the workplace including the issue of disabilities and how to handle them in the workplace.

The other thing that I wanted to make sure of that you understand is that the accommodation process should be documented as closely as you can because if you are ever questioned or ever challenged by an employee with regard to how your accommodation process took place and what was stated, you really need some good documentation on what was asked by the employee, what was offered by the employer, and how the accommodation process took place and who participated and exactly what was offered or was not offered by the company, so make sure that you document that as carefully as possible.

Okay, those are the significant developments of the day. Thanks very much. We have one more telebrief for the year, December 28th, believe it or not, Wednesday the 28th. As always, I invite any questions or comments from any of you out there or if you would prefer a more private venue, certainly you can call me on my number 410-209-6417 or my email hkurman@offitkurman.com. Any questions out there? Okay, well, everybody knows everything so that's a good thing, and I guess if nobody has any questions I just wish everybody the best of holidays, be safe, be happy, enjoy it with your family, and we will reconvene on the 28th.