

LABOR & EMPLOYMENT TELEBRIEF

By

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Howard Kurman:

Okay, it is 9:02 on my clock the official clock. We are going to get started. Michelle, can you mute this please. Okay, good morning everybody. This is the first telebrief in February. The next telebrief will be the fourth Wednesday in February which is February 22. We are going to concentrate this morning on some trends that I think are important particularly in the employment HR field going forward under the Trump administration and we are going to do something a little different today I am going to lead off with some things that have gone on across the labor and employment spectrum from a trending stand point and then I am going to have a colleague of mine Greg Currey, some of you may know Greg, Greg is an attorney in the labor and employment department discuss an issue that really has come to the forefront certainly in the last couple of weeks which is the entire immigration issue and how it may impact you as HR professionals because it is not only a social, economic, and political issue but certainly an issue that has an impact on all of you out there who are in the HR arena. Let me start off by noting some significant trends and then with about 10 minutes to go I am going to have Greg take over and talk a little bit about the immigration issues.

First, significantly last week a national right to work bill was introduced into the House of Representatives. I know that the last telebrief we had I talked about a right to work law being passed in Kentucky. This is on the national sort of arena and side of things and as you know a right to work law would be an amendment to the National Labor Relations Act, which allows unions and employers to mandate union membership as a condition of employment or continued employment as an exception under the National Labor Relations Act. There have bills introduced into Congress in the past so-called national right to work laws but given the composition of Congress in both the Senate and the House with Republican majority this may have an opportunity to pass and if it did you would have a dramatic and significant effect on unionization in this country, because those of you who do have unionized employees under a collective bargaining agreement know that under a union security provision employees have no choice in paying union dues either coming in as a new employee or as an incumbent employee. If a national right to work law were passed this would outlaw such agreements and would mean that if a union wanted to collect union dues from a unionized employee they would actually have to go around and get those dues voluntarily being paid by a unionized employee, which may take place sometimes but certainly would make it a lot more difficult I think to organize and to maintain a stranglehold over current unionized employees. With a Republican president who has spoken out against mandatory unionization in the past, this may have some traction as we go forward into the year so I'll stay tuned on this and you should stay tuned on this as well.

Speaking about the National Labor Relations Act and Board, President Trump last week appointed Philip McNamara as the acting chair of the National Labor Relations Board. As some of you may know and I have talked about this in prior telebriefs, the board right now consists of three members, two Democrats and one Republican, and the former chair was Mark Gaston Pearce, a very liberal Democrat. Under the Democratic majority in the last two or three years there have been many many cases that have been decided by the National Labor Relations Board that we have talked about in these telebriefs, which really stretch the limits of concerted protected activity under Section 7 of the National Labor Relations Act. Philip McNamara prior to coming onto the board was a management labor lawyer with many well-known law firms including Seyfarth Shaw, a national firm with large labor and employment department. No doubt when Trump appoints two new members, because there are currently two vacancies to the National Labor Relations Board, when he appoints two new members the majority of the board will be Republican there will be three Republicans and two Democrats, which may mean that many of the decisions which were rolled roll out in the last two or three years under the Obama administration made to be rolled back or modified in a significant way; largely the ones I believe having to do with concerted protected activity where the board has stretched those limits and paid attention to handbook provisions, which may or may not in the boards prior view pass muster under Section VII of the National Labor Relations Act. I believe that when we go back to a Republican majority much of the scrutiny that the Obama board paid to these handbook provisions may either be dissipated or frankly ignored and so all of you who may have made changes to your handbooks as we have talked about in past telebriefs may be given sort of a much more flexible approach and you may even be able to go back and modify again some of your provisions. Stay tuned but it is a sure thing that we will have two Republican appointees to the National Labor Relations Board, which will make it a much more conservative board than it was under the Obama administration and probably make your life easier as HR professionals.

The latest statistics on union membership put out by the Bureau of Labor Statistics is that union membership has fallen once more. Total membership in the workplace has fallen from 11.1% in 2015 to 10.7% in 2016 but the more relevant statistics for you all because that encompasses both private and public sector is that the private sector unionization percentage fell from 6.7% in 2015 to 6.4% in 2016. That is a very low percentage obviously less than 1 in 10 private-sector employees now unionized and it seems to be a continuing downward trend which again makes it harder to unionize and, of course, if there were a national right to work law that percentage would dip even further in my opinion.

I indicated in our last telebrief that Victoria Lipnic has been appointed in the last couple weeks as the new chair of the Equal Employment Opportunity Commission and she again was a former management attorney at Seyfarth Shaw and I do believe that she will have an impact on many of the initiatives that have been announced particularly towards the end of the Obama

administration; one of which was changing the reporting requirements under the EEO 1 report, which would make it much more detailed and have to include compensation information that would be submitted to the EEOC. She has articulated her opposition to that and EEOC is in the position now where there are a couple of positions for commissioners that are open as well as the general counsel position that has been vacated. When you add all that together it will be interesting to see as a trend what the Equal Employment Opportunity Commission will be doing in the future with regard to its strategic initiatives and strategic enforcement plan that we have talked about in prior telebriefs. It will be interesting to see whether they are as concentrated on class based claims and high profile litigation as they were under the Obama administration and whether under a Republican sort of majority they will move to clear the backlog that is significant and built up during the Obama administration. Some of you may have charges that have been pending at the Equal Employment Opportunity Commission for months if not years and it will be interesting to see whether any of that backlog is cleared up under a new administration.

There is also talk federally that there may be some modification if not outright repeal of the Davis-Bacon Act. Those of you who are federal contractors know that under the Davis-Bacon Act this is essentially an act, which mandates that government contractors doing construction work of some sort whether as a prime or as a subcontractor pay a prevailing wage to the employees. It has repeatedly come into attack historically but again because of the fact that we now have a Republican majority in the house and in the Senate and a Republican president, it remains to be seen whether there would be a viable attack to either modify the Davis-Bacon Act or replace it or repeal it in some significant way. President Trump has not come out one way or the other so we do not know exactly what will happen with him and with Congress but it is something that has gotten traction in Congress and publicity so 2017 may see some information coming forth on the Davis-Bacon Act.

It leads me to some discussion on Andrew Puzder, who is the nominee for the Secretary of Labor. There have been numerous hearings which have been scheduled and postponed, some of you may have read the paper yesterday, which indicated that he seemed to be in some hot water for having employed in his household an undocumented worker and we will talk a little bit about that in a minute with Greg Currey. There is no hearing that I know off now that is rescheduled and whether he will be confirmed as the next Secretary of Labor is a little problematic, obviously there is a Republican majority and so just as though Betsy DeVos who had significant opposition was confirmed irrespective of the opposition, maybe we will see that with Mr. Puzder as well. He certainly would be a much more pro-employer Secretary of Labor than we had with Tom Perez under Obama.

I also want to mention that there is an executive order signed by President Trump, the so-called one in two out executive order, which indicates that any time a new agency wants to promulgate a new regulation whether it's the Department of Labor, EEOC, National Labor Relations Board, that in order to

promulgate one regulation they have to get rid of two other regulations and so it will remain to be seen how this impacts the whole regulatory scheme that existed and seemed to flourish under the Obama administration.

The last sort of trending note that I wanted to pass along prior to Greg talking about the immigration issue is, of course, the nomination of Neil Gorsuch from the 10th circuit as the next Supreme Court nominee. It goes without saying it seems to me that as Scalia's replacement, he will be much more employer oriented than the Obama appointee. He has made it a point of indicating in his decisions that he is much less apt to give deference to administrative agencies like the Equal Employment Opportunity Commission, NLRB and Department of Labor and essentially what his approach is, is that a Supreme Court justice is there to state what the law currently is not what it should be and not what the administrative agencies necessarily say it should be under regulations. His approach generally is that for instance if you wanted to make sexual orientation a protected classification under the law that should be enacted and legislated by Congress and not the Supreme Court. If he is confirmed, which I think probably is likely despite all the rhetoric to the contrary it would seem to me that he would be in the Scalia camp and a much more friendly Supreme Court justice to employer-related issues than the other appointees that we have or much more liberally oriented.

Okay, so those are the trends from my standpoint and I am going to turn it over to Greg Currey, who is going to talk to you a little bit about the immigration issues, which I know you have read about, the Ninth Circuit had a one hour hearing on last night with regard to the travel ban so I am going to turn it over to Greg and then at the end we can answer any questions.

Greg Currey:

Great, thanks, good morning. As Howard mentioned I am a labor and employment attorney with the firm, I also have a practice in immigration law particularly helping employers and our corporate clients handle immigration matters. Obviously, the past couple of weeks have been a busy and exciting time for those of us in the immigration field. Just by a way of a bit of background unlike a lot of the other employment-related laws where it is the acts of Congress and the administrative agencies immigration is an area where the President through executive order and through his direction of the agencies has a lot of power over what policies and procedures will be put in place and how things will be implemented. One of the biggest hurdles if you actually listened to the webcast last night, apparently it set a record for the Ninth Circuit, if you listened to the webcast last night the attorneys for the Plaintiff's that were challenging the ban or challenged on this issue because generally speaking there is recognized to be wide authority for the President to issue executive orders on this issue. That being said there are limits and as this week passes and the Ninth Circuit issues a ruling we will see sort of the scope of what those limits may or may not be. For those of you that are more interested in some of the immigration specific issues I have a webinar later this month on February 23rd, you can find out information about it on our website, it is called

“Management Matters” but really today what I wanted to talk about is what as employers you should be doing in light of this new landscape.

As of today, there have been three executive orders that affect immigration. The refugee ban has gotten a lot of attention; however, there are elements in both the executive orders that related to “sanctuary cities” as well as immigration orders related to the construction of a border wall with Mexico that could potentially have impacts on employers. There are also draft executive orders that have been circulating around the White House and that have been leaked to the press that also would affect legal immigration, immigration quotas and so we are talking about things like H1Bs and L1s.

The biggest common threat to all of these is that this administration is placing a lot of focus on unauthorized immigrants working in this country. As employers, there are a couple things that you absolutely need to be aware of. First and foremost in November, a new I-9 form was issued, that form is required to be in use now. If you are hiring new employees you need to make sure that on the form there is an expiration date, you need to make sure that you are using the current form that is not expired. For I-9 violations, fines can range between a \$100 and \$1,100 for first offenders per violation and so if you are using the wrong form that is a violation, if anything is filled out wrong on that form that is another violation and that is per line item. If the Department of Labor or USCIS came in and did an audit and found that you had five I-9s with three issues each on them that is 15 violations so you can see how these things add up quickly. Because unauthorized immigration is a major focus the texts are replete with references to what is a big draw for unauthorized immigration, its employment. It is American jobs that pay at higher rates, it is a better way of life and so by cracking down on employers hiring unauthorized immigrants administration feels that they can sort of stop the root cause of a lot of the unauthorized immigration. One of the executive orders called for the hiring of 10,000 additional agents or ICE and USCIS. I would expect that that would lead to an increase in the number I-9 audits that employers are facing. Its absolutely imperative that you have your HR professionals or your staff look and make sure that when employees are hired and being onboarded that they are taking the proper steps to have the I-9 forms filled out correctly, that you are reviewing the correct documents and that the forms are being filled out and stored correctly.

Another executive order, this one is a draft order that has not been circulated or has not been officially signed but you can expect that something along these lines to be coming down the line, is the administration by granting preferences or employment-based visas is looking to promote and push the use of the E-Verify system. For those of you who are not familiar, E-Verify is an electronic system that is similar to the form I-9. It is used by employers when hiring. Currently, its use is voluntary for private employers, it is mandatory for Federal contractors and those that have subcontracts with Federal contractors, but for most employers it is voluntary. There is going to be a push to make the use of it more widespread. There is no fee to use it. There is some additional you know

professional administrative cost, but its a electronic database that is maintained by USCIS, Department of Homeland Security, Department of Labor and Social Security Administration. When you hire an employee, you input basic information about them including their Social Security number and you immediately get back a verification that that person is, in fact, who they say they are. One of the biggest issues with unauthorized immigration is that with document technology now it is very easy for individuals to come with a fake drivers license with a fake Social Security number that look real. Or you have situations where people are using stolen identification or just you know fabricated identification. The forms look facially valid when you are doing a review but sometime down the line you find out that that's not actually the person's Social Security number. The E-Verify system sorts that out from the beginning and so you can see why an administration or a government that says look we want to make sure that you are not hiring unauthorized immigrants by pushing the use of E-Verify that is going to enable employers to find out right away if the people that are hiring are authorized to work.

Obviously, a sort of a counter weight to some of that keep in mind Title VII and state and local anti-discrimination statutes prohibit discrimination on the basis of national origin. You want to make sure that when you are hiring you are still complying with both sets of laws and both directives. You do need to be careful that when you are doing hiring that for example when an individual submits the I-9 form that you are not placing greater scrutiny on the documents or the form submitted by individuals who appear to be of different nationalities. That may feel like the direction that the administration may be pushing on employers but you have to keep in mind that there is this countervailing law out there in terms of equal employment statute.

The other areas where employers will want to be alert is if they are interested in hiring foreign nationals. The administration is looking at changing the quotas, they are looking at changing the priorities and so if you are hiring individuals who are currently citizens of foreign countries and are residing in foreign countries you need to make sure that there are not any existing banned individuals from those countries, you need to make sure that the old forms and the old guidance is up to date and that you are really dotting your I's and crossing your T's in terms of bringing these individuals over. Because you can certainly expect the USCIS is going to be placing greater scrutiny on any applications for either short-term or long-term visas.

Howard Kurman:

Okay well Greg, I appreciate that. Michelle, can you please take this off of mute. As I always do, you know, I indicate that if you have any questions here or comments feel free to bring them up now. Otherwise, you can certainly send me an email at hkurman@offitkurman.com or phone (410) 209-6417 or Greg is here if you have any immigration-related issue as well and as he indicated he is going to be putting on a webinar. I am sure that will be much more detailed in the overview that he provided this morning. Any questions or comments?

Mike: Hey Howard its Mike, hi Greg. Hey, so what do you think the Ninth Circuit is going to rule. Do you have an opinion either way?

Howard Kurman: I listened to it and with a caveat that indicates that I have frequently been wrong my guess is that it may be a 2:1 decision in favor of the state of Washington and Minnesota, that is what I think but hard to tell from oral argument but if you ask me to handicap that is where I would come down.

Mike: So then the next step would be an appeal to the Supreme Court.

Howard Kurman: Well could be but remember the issue before the Ninth Circuit was whether they would lift the stay you know on the Temporary Restraining Order. There is still a case that is pending for the federal court on the merits of whether or not federal court would issue an injunction, so I am not sure it would be ripe at that point for appeal to the Supreme Court but it may. This is going to be a very long and protracted period of litigation not only in this case but remember there are cases pending in other circuits as well.

Greg Currey: The other thing to keep in mind is that the purpose of this is to put a 90 day sort of hold on everything to have this you know the "extreme vetting" so to the extent that there is an extended stay for any period of time that sort of undercuts the order as it was written anyway. You know it may be that if the Ninth Circuit comes back and you know upholds the stay of the executive order the administration just goes back to the drawing board anyway.

Mike: Okay, thanks.

Howard Kurman: Any other questions or comments? Okay, well if not we will see you figuratively on Wednesday, the 22nd. Again, if you have any questions feel free to email or call. Take care.